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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 184.

SOLON L. FRANK AND SAMUEL FRANK, DOING BUSINESS UNDER THE NAME OF S. L. & S. FRANK, PLAINTIFFS IN ERROR,

vs.

JOSEPH VOLLKOMMER, JR., AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JACOB VOGT, A BANKRUPT, AND JACOB VOGT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 17, 1906.

(20,051.)

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New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt an alleged bankrupt,

Plaintiff,

against

SOLON L. FRANK and SAMUEL FRANK doing business as S. L. & S. Frank and Jacob Vogt,

Defendants. 3

Statement Under Rule 41.

This action was commenced by the service of a summons and complaint on the defendant Samuel Frank on the 20th day of December, 1902. The defendants Solon L. Frank and Samuel Frank served notice of appearance December 23rd, 1902. The answer of the defendants Solon L. Frank and 4
Samuel Frank was served on or about the 28th day of January, 1903. The amended answer of the defendants Frank was served on or about February 18th, 1903. The names of the parties are correctly stated in the title and there has been no change in the parties or attorneys pending this action. Mr. Francis B. Mullin has appeared as attorney for the plaintiff and Mr. Roger Foster has

appeared for the defendants Solon L. and Samuel Frank. The defendant Jacob Vogt was also duly served with the summons and complaint, but did not appear or answer.

JUDGMENT ROLL.

Summons.

6

SUPREME COURT—COUNTY OF KINGS.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the estate of Jacob Vogt, bankrupt,

Plaintiff,

7 against

SOLON L. FRANK and SAMUEL FRANK, doing business as S. L. & S. Frank, and Jacob Vogt,

Defendants.

To the above named defendants:

YOU ARE HEREBY SUMMONED to answer 8 the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated, December 17th, 1903.

FRANCIS B. MULLIN, Plaintiff's Attorney, Office & P. O. Address No. 44 Court Street, Brooklyn, N. Y.

9

Complaint.

SUPREME COURT OF NEW YORK.

COUNTY OF KINGS.

JOSEPH VOLLKOMMER, JR., as Trustee in bankruptcy of the estate of Jacob Vogt, bankrupt,
Plaintiff,
against
SOLON L. FRANK and SAMUEL FRANK, doing business as S. L. & S. Frank, and Jacob Vogt,
Defendants.

Complaint.

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11

The above named plaintiff by this his duly verified complaint respectfully shows to this court and alleges: I. That on the 28th day of June, A. D., 1902, Joseph Vollkommer, a creditor of the above named Jacob Vogt, filed his duly verified petition in the United States District Court for the Eastern District of New York, praying that said Jacob Vogt be adjudged a bankrupt.

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II. On information and belief that on the 30th day of June, A. D., 1902, John Wanamaker, a firm and creditor of said Jacob Vogt, James A. Hearn & Son, a firm and creditor of said Jacob Vogt, and Adams Dry Goods Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a creditor of said Jacob Vogt, filed their duly verified petition in the

13 *Complaint.*

United States District Court for the Eastern District of New York, praying that said Jacob Vogt be adjudged a bankrupt.

III. That on or about the 10th of July A. D., 1902, said Jacob Vogt was duly adjudged an involuntary bankrupt in the United States District Court for the Eastern District of New York, pursuant to the prayer of said petitioning creditors.

14 IV. On information and belief, that the above named defendants, Solon L. Frank and Samuel Frank were at all the times herein mentioned and still are co-partners doing business in the Borough of Manhattan, in the City and State of New York, under the firm name and style of S. L. & S. Frank.

V. That on or about the 12th day of November, A. D., 1902, plaintiff was duly appointed trustee in bankruptcy of said Jacob Vogt, by the United

15 States District Court for the Eastern District of New York, and duly qualified as such on or about the 21st day of November, A. D., 1902, and thereupon entered upon the duties of his office as such trustee in bankruptcy of said Jacob Vogt; since which date the plaintiff has been and now is the trustee in bankruptcy of the estate of said Jacob Vogt, bankrupt.

VI. That on the 25th day of June, A. D., 1902, and for several years prior thereto, the above

16 named Jacob Vogt had his residence and abode in the Borough of Brooklyn, County of Kings in the State of New York, and in the Eastern District of New York.

VII. That on or about the 16th day of April, A. D., 1902, and within four months of the filing of the petitions aforesaid, said Vogt, as plaintiff is informed and believes, executed and delivered to said defendants Frank, a certain instrument in

writing purporting to be a chattel mortgage of certain of the goods and chattels owned by said Vogt, to secure the payment of the sum of Eight thousand five hundred dollars ($8,500) a copy of which said alleged chattel mortgage is hereto annexed, marked Schedule "A," and made a part of this complaint; and that in the schedule of said alleged chattel mortgage is set forth all the property owned by the above named Jacob Vogt, at the 18
date thereof, except such as was exempt from execution under the laws of the State of New York.

VIII. That at the time of making said alleged chattel mortgage, said Vogt was insolvent and known to said defendants Frank to be insolvent; that said Vogt and said Frank intended by said alleged chattel mortgage to create, and did apparently create an unlawful preference in favor of said Franks; said Vogt did then owe and now owes a large number of creditors, including the petition- 19
ers above named, sums aggregating several thousands of dollars, exclusive of what he may owe said Franks if anything; that the effect of said alleged chattel mortgage will be to enable said Franks to obtain a greater percentage of their debt, if any, than any other of said creditors of the same class.

IX. That on or about the 30th day of June, A. D., 1902, an order was duly made by Honorable Edward B. Thomas, Judge of the United States 20
District Court for the Eastern District of New York, in the matter of Jacob Vogt an alleged bankrupt, appointing Arthur T. Stoutenberg temporary receiver of the property of the said Jacob Vogt, an alleged bankrupt; that on the same day the said temporary receiver duly qualified and entered upon the discharge of his duties as such temporary receiver.

21 *Complaint.*

X. That by agreement between said Franks and the above named petitioning creditors of said Vogt, duly approved by the District Court of the United States for the Eastern District of New York, and entered of record therein on the 2nd day of July, A. D., 1902, a copy of which is hereto annexed and marked Schedule "B," and made a part of this complaint, it was provided that certain
22 goods and chattels of said Jacob Vogt in said schedule "B" enumerated and set forth, be sold at public auction in the City of New York on the 3rd day of July, 1902, by the said temporary receiver; that the expenses of the sale be paid out of the proceeds thereof; that the said temporary receiver deposit the net proceeds of said sale at the People's Trust Company of Brooklyn as a special fund, there to await the further order of the Court upon due notice to all creditors who have or may
23 hereafter appear; that the lien, if any, of the alleged chattel mortgage of the said defendants Frank be transferred to and attached to said special fund, or deposit, in lieu of and to the same extent as it attached to the said property thereinbefore directed to be sold; that in pursuance thereof, said sale was had on the 3rd day of July, A. D., 1902, and the net proceeds thereof, amounting to about $5,482.47, were on or about the 10th day of July, 1902, duly deposited in the People's Trust
24 Company of Brooklyn, as provided by said agreement.

XI. That said defendants Frank claim a lien upon said special fund to the whole extent thereof; and claim that said Vogt owes them more than $5,500.

XII. That said claim of lien and indebtedness constitutes a cloud upon plaintiff's title to said fund.

XIII. Upon information and belief that the alleged indebtedness of said Vogt to said Franks, which the said alleged chattel mortgage purports to secure is entirely void, and the said mortgage entirely void for the following reasons: For some years prior to the making of said mortgage, said Vogt and said Franks had many dealings with each other, in the course of which said Vogt borrowed at divers times from said Franks various sums of money for which he gave notes; and that at divers times when said notes became due, the said Vogt being unable to meet them, and the said Franks desiring to profit from his helpless situation, together mutually and corruptly against the form of the statute in that case made and provided, agreed that the said Franks should extend the time of payment of said indebtedness, or renew the said notes, if the said Vogt would agree to pay or give notes for the same, much larger than said indebtedness with legal interest, such excess being by way of bonus or usury.

XIV. That there was no present consideration passed for the alleged chattel mortgage before mentioned; that the same was made for an amount greatly in excess of any indebtedness claimed to be owing from said Vogt to said Franks; that the said mortgage was a fraudulent device between the said Vogt and the said Franks to eat up the estate of the said bankrupt to the injury and loss of the other creditors of said Vogt; that a large portion of the property and chattels sold at said sale on the 3rd day of July, 1902, as aforesaid, were acquired by the said Vogt and became his property long after the execution of said alleged chattel mortgage, and were not included in the said alleged mortgage, or in the schedules thereof; and that said Franks could claim no lien upon such

property and chattels; that a large portion of the proceeds of said sale so deposited in court, are proceeds of such chattels and property which were not thus included in said alleged mortgage or the schedules thereof.

WHEREFORE, plaintiff demands judgment that the said alleged chattel mortgage be declared null and void, and he cancelled and discharged of record, and that the alleged indebtedness intended to be secured thereby be declared null and void; and that the said special fund be declared free of the lien or incumbrance of said alleged chattel mortgage, and free from any lien or claim by the said Franks under said mortgage or otherwise; and that plaintiff have such other and further relief in the premises as to the court may seem just, and the costs and disbursements of this action.

FRANCIS B. MULLIN, Attorney for Plaintiff, Office and Post Office Address, 44 Court Street, Brooklyn, N. Y.

City and State of New York,
Borough of Brooklyn, } ss:
County of Kings,

Joseph Vollkommer, Jr., being duly sworn, deposes and says that he is the plaintiff in this action and has read the foregoing complaint; that he knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

(Signed) JOSEPH VOLLKOMMER, JR.

Sworn to before me this 18th day of Dec., 1902.

(Signed) W. Chas. B. Thornton, Notary Public, Kings County, N. Y.

33

Schedule "A."

KNOW ALL MEN BY THESE PRESENTS, That I, JACOB VOGT, of the City of Brooklyn, County of Kings, State of New York, party of the first part, for securing the payment of the indebtedness hereinafter mentioned, and in consideration of the sum of one dollar to me duly paid by S. L. & S. Frank, of the City, County and State 34
fo New York, parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, 51 horses, 7 double trucks, 4 double wagons, 8 single wagons and all other goods and chattels mentioned in the schedule hereunto annexed, and now in the stable situated at No. 846 to 850 Atlantic Avenue, in the City of Brooklyn, 35
Kings County, State of New York.

TO HAVE AND TO HOLD, all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, their executors, administrators and assigns forever; AND, I the said party of the first part, for myself and my heirs, executors and administrators, all and singular of the said goods and chattels above bargained and sold unto the said parties of the second part, their heirs, execu- 36
tors, administrators and assigns, against me, the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant and forever defend. UPON CONDITION, that if I, the said party of the first part, shall and do well and truly pay unto the said party of the second part, their executors, administrators or assigns, the true and lawful sum of Eight

thousand and five hundred dollars ($8,500.00), on demand, with legal rate of interest added thereon, then these presents shall be void. AND I, the said party of the first part, for myself and my heirs, executors, administrators and assigns, do covenant and agree, to and with the said parties of the second part, their executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, Eight thousand and five hundred dollars, then it shall and may be lawful for, and I, the said party of the first part, do hereby authorize and empower the said parties of the second part, their executors, administrators or assigns, with the aid and assistance of any person or persons, to enter my dwelling house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, Eight thousand and five hundred dollars and all charges touching the same; rendering the overplus (if any) unto me or to my heirs, executors, administrators or assigns. AND until default be made in the payment of the said sum of money, I, the said party of the first part, to remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same.

IN WITNESS WHEREOF, I, the said party of the first part, have hereunto set my hand and seal the Sixteenth day of Apl., One thousand nine hundred and two (1902).

JACOB VOGT. (L. S.)

Sealed and delivered in the presence of W. H. Woodhull.

SCHEDULE REFERRED TO IN THE FOREGOING MORTGAGE.

(51) Fifty-one horses, (7) Seven double trucks, (4) Four double wagons, (8) Eight single wagons, (14) Fourteen sets double harness, (12) Twelve sets of single harness, one set double coach harness, one set double light harness, (3) Three 42
sets of single brass harness, (1) One set single light harness, (1) One trap, (1) One covered cart, (1) One two-wheeled cart with top, (1) One two-wheeled cart, (60) Sixty horse-collars, One bellows, One Anvil, One drilling machine, One thread cutter lot of hammers and Pinchers, (35) Thirty-five stable blankets, (40) Forty Outside Blankets, (30) Thirty Feed-bags, (24) Twenty-four lamps, Lot of extra straps, (2) Two riding saddles, (2) Two Riding bridles, (1) One Iron safe, (2) Two desks, (4) 43
Four Office chairs. JACOB VOGT.

Dated, New York, April 16, 1902. In the presence of: W. H. WOODHULL.

State of New York,
City of New York, } ss:
County of New York,

On the Sixteenth day of April in the year One thousand nine hundred and two, before me person- 44
ally came Jacob Vogt, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and duly acknowledged that he executed the same.

W. H. WOODHULL, Notary Public (No. 105), N. Y. County.

45

Schedule "B."

At a Stated term of the United States District Court, held in and for the Eastern district of New York, at the General Post Office Building, in the Borough of Brooklyn, City of New York, on the second day of July, 1902.

46 Present: Hon. EDWARD B. THOMAS, District Judge.

IN THE MATTER
of
JACOB VOGT, an alleged bankrupt.

A petition having been presented to this Court on the second day of July, 1902, by A. T. Stoutenburgh, the Temporary Receiver of the alleged
47 bankrupt, praying for an order directing him to sell at public auction the entire plant known as Jacob Vogt's Suburban Delivery, consisting of delivery horses, truck wagons, coach horses, mules, vans, trucks, delivery wagons, covert carts, rubber tired traps, game carts, breaking carts, gigs, harnesses, bridles, saddles, collars, blankets, lamps, feed-bags, blacksmith's outfit, and safe and office desk, and everything pertaining to said plant, and
48 such other property of said alleged bankrupt as may come into said Receiver's hands; and the same having come on to be heard.

NOW, upon reading and filing the said petition of A. T. Stoutenburgh, Temporary Receiver, verified the 2nd day of July, 1902 and the consent of Thompson & Maloney, Attorneys for S. L. & S. Frank, who claim to hold a chattel mortgage on said above described property, which alleged chat-

tel mortgage was dated the sixteenth day of April, 1902, and filed in the office of the Register of the County of Kings, on the eighteenth day of April, 1902; and the consent of J. Frank Yawger, Esq., Attorney for the petitioning creditors in the above entitled proceeding, and the consent of Francis B. Mullin, Esq., Attorney for the petitioning creditor, Joseph Vollkommer, and after hearing A. T. Stoutengurgh, Esq., the Temporary 50
A. T. Stoutenburgh, Esq., the Temporary Receiver, in person, in support of said motion, and no one appearing in opposition thereto, and it appearing to my satisfaction that it is for the best interests of the estate of the alleged bankrupt that the said property be sold, and it further appearing to my satisfaction that the said S. L. & S. Frank claim to have acquired and to now hold a chattel mortgage above described upon certain of the property of the al- 51
leged bankrupt, and on motion of A. T. Stoutenburgh, Esq., the Temporary Receiver, in person, it is

ORDERED, that the said Temporary Receiver be and he hereby is authorized and directed to sell at public auction on Thursday, July 3rd, at 11 A. M., in the forenoon of that day, at the Auction Mart of the Fiss, Doerr & Carroll's Horse Company, on the north side of 24th Street, between Third and Lexington Avenues in the Borough of 52
Manhattan, City of New York, and on such other and further days as the Receiver may designate, notice of the time and place of this sale to be published on the 3rd day of July, in the New York Herald, a newspaper published in the County of New York, the entire plant known as Jacob Vogt's Surburban Delivery, consisting of the personal property before described, belonging to the said alleged bankrupt, free from any and all liens of any kind and nature thereon, and it is

Schedule "B."—Order of U. S. District Court.

FURTHER ORDERED, that the expenses of said sale be deducted from the moneys derived therefrom and it is

FURTHER ORDERED, that said Temporary Receiver be and he hereby is authorized and directed, within five days from the date of said sale, to deposit in the People's Trust Company of Brooklyn, as a special fund, there to await the further order of the Court, upon due notice to all creditors who have or may hereafter appear, the proceeds resulting from the sale of said property, after the deduction of the expenses of said sale, and that the lien, if any, of the said alleged chattel mortgage of the said S. L. & S. Frank, be transferred to and attached to said special fund or deposit in lieu of, and to the same extent that it attached to the said property hereinbefore directed to be sold.

IT IS FURTHER ORDERED, that the Temporary Receiver be and he hereby is authorized and directed to deposit the balance of the proceeds of said sale as part of the general fund of the estate of the alleged bankrupt.

(Sgd.) Edward B. Thomas, U. S. J.

We, the undersigned, hereby consent to the entry of the foregoing order. Dated, New York, July 1st, 1902.

J. FRANK YAWGER, Attorney for petitioning Creditors.

FRANCIS B. MULLIN, Attorney for Petitioning Creditor, Joseph Vollkommer.

THOMPSON & MALONEY, Attorneys for S. L. & S. Frank, Claiming to be Chattel Mortgagees.

57

Amended Answer of Defendants Frank.

SUPREME COURT.—County of Kings.

Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt,

Plaintiff,

against

Solon L. Frank and Samuel Frank doing business as S. L. & S. Frank and Jacob Vogt,

Defendants.

58

59

The Defendants Solon L. Frank and Samuel Frank by their attorney, Roger Foster, in this their amended answer to the complaint herein allege as follows:

I. They deny any knowledge or information sufficient to form a belief as to each and all the allegations contained in paragraphs marked I, II, III, and V of said complaint.

II. They admit the allegations contained in paragraph marked IV, of said complaint.

60

III. They deny any knowledge or information sufficient to form a belief that said Jacob Vogt had his business in the Borough of Brooklyn, County of Kings and Eastern District of New York, on the 25th day of June, 1902, and as they deny any knowledge or information sufficient to form a belief that said Jacob Vogt had his business in the said Borough of Brooklyn for several years prior to June 25, 1902.

They deny any knowledge or information sufficient to form a belief that said Jacob Vogt had his abode in the said Borough of Brooklyn on June 25, 1902. They deny any knowledge or information sufficient to form a belief that said Jacob Vogt had his abode in this said Borough of Brooklyn for several years prior to June 25, 1902.

IV. They admit that on or about the 16th day of April, 1902, the defendant Jacob Vogt executed and delivered to said defendants Frank a certain chattel mortgage of certain goods and chattels owned by said Vogt, to secure the payment of the sum of eight thousand five hundred ($8,500.00) dollars; a copy of which said chattel mortgage is annexed to the said complaint marked schedule "A." Said defendants Frank deny knowledge or information sufficient to form a belief as to that part of the paragraph marked VII of said complaint herein, which alleges that the schedule of said chattel mortgage sets forth all the property owned by the above named Jacob Vogt, at the date thereof, except such as was exempt from execution under the laws of the State of New York.

V. They deny that at the time of making said chattel mortgage said Vogt was insolvent, and they deny that at the time said chattel mortgage was made, said Vogt was known to these defendants Frank to be insolvent. They deny that said Vogt and these defendants Frank, by said chattel mortgage, intended to create an unlawful preference in favor of these defendants Frank, and they deny that either of the parties to the said chattel mortgage so intended. They deny that by said chattel mortgage said Vogt and these defendants Frank apparently created an unlawful preference in favor

of these defendants Frank, and they deny that said parties to said mortgage did create an unlawful preference in favor of said Franks. They deny any knowledge or information sufficient to form a belief that said Vogt did then owe a large number of creditors sums aggregating several thousand dollars exclusive of what he owes to these defendants Frank, and they deny any knowledge or information sufficient to form a belief that 66
said Vogt now owes a large number of creditors sums aggregating several thousand dollars exclusive of what he owes to these defendants Frank. They deny knowledge or information sufficient to form a belief that the effect of said chattel mortgage will be to enable said Franks to obtain a greater percentage of their debts, than any other of said creditors of the same class.

VI. They admit that on or about June 30th, 1902, an order was made by Honorable Edward B. 67
Thomas, Judge of the United States District Court for the Eastern District of New York, in the matter of Jacob Vogt, an alleged bankrupt, purporting to appoint Arthur T. Stoutenburgh, temporary receiver of the property of the said Jacob Vogt; but they deny knowledge or information sufficient to form a belief as to the allegation that said order was duly made and they deny knowledge or information sufficient to form a belief that the said receiver duly qualified. They ad- 68
mit that said Stoutenburgh has entered upon the discharge of his duties as such temporary receiver.

VII. They admit the allegations contained in paragraphs marked X and XI of said complaint herein.

VIII. They deny the allegation in paragraph marked XII, of said complaint herein that said

claim of lien and indebtedness constitutes a cloud upon plaintiff's title to said fund, and they deny each and every part thereof.

IX. They deny that the alleged indebtedness of said Vogt to said Franks, which the said chattel mortgage purports to secure is void. They deny that the said mortgage is void. They admit and allege that for some years prior to the mak-
70 ing of said mortgage, said Vogt and said Franks had many dealings with each other in the course of which said Vogt borrowed at divers times from these defendants Frank various sums of money for some but not all of which he gave notes. And these defendants Frank further allege that prior to the making of said mortgage a chattel mortgage executed on or about the 28th day of August, 1900, to secure payment of the sum of Three thousand eight hundred ($3,800) Dollars which was due and
71 owing by the said Vogt to these defendants on and prior to December 1st, 1901, and on April 16, 1902, was executed by the said Vogt to these defendants Frank and upon information and belief that the same was duly renewed and recorded in August, 1901, and was a lien upon the greater part of the chattels which are described in the chattel mortgage referred to in said complaint, that subsequent to the execution of each of said mortgages, these defendants Frank advanced to said Vogt
72 considerable sums of money upon the faith of each of said mortgages, and the said Vogt became indebted to these defendants Frank for the purchase of horses and otherwise in considerable sums of money; that it was agreed between the said Vogt and these defendants Frank both at the time when each of said mortgages was executed and at the time of each of said advances that said chattel mortgages and each of them should cover and

should secure the indebtedness of said Vogt to these defendants which arose subsequent to the execution of the first of said mortgages; that prior to June 28th, 1902, these defendants Frank took possession of all the property described in and covered by both of said chattel mortgages with the consent of said Vogt. They deny that at any time these defendants Frank together with said Vogt agreed that the said Franks should extend the 74
time of payment of said indebtedness or renew the said notes if the said Vogt would agree to pay or give notes for the same larger than said indebtedness with legal interest. They deny that any of said notes was given for more than was actually due by said Vogt to these defendants Frank. They deny that any of these notes was affected by usury.

X. They deny that there was no present consideration passed for the chattel mortgage mentioned in said complaint. They deny that the said 75
chattel mortgage was made for an amount greatly in excess of any indebtedness claimed to be owing from said Vogt to these Franks. They deny that the said mortgage was a fraudulent device between the said Vogt and the said Franks to eat up the estate of the said bankrupt to the injury and loss of the other creditors of said Vogt; they deny upon information and belief that a portion of the property in chattels sold at said sale on the 3rd day of July, 1902, was acquired by the said Vogt; 76
they deny upon information and belief that a portion of the property and chattels sold at said sale became the property of said Vogt long after the execution of said chattel mortgage; they deny upon information and belief that a portion of the said property and chattels was not included in the said mortgage; they deny upon information and belief that a portion of the said property and chat-

77 *Amended Answer of Defendants Frank.*

tels was not included in the schedule thereof; they deny upon information and belief that said Franks could claim no lien upon such property and chattels; they deny upon information and belief that any of the proceeds of said sale so deposited in Court, are proceeds of such chattels and property which were not thus included in said mortgage or schedule thereof. They allege that
78 it was agreed between them and said Vogt that all horses, feed, vehicles and other articles of the same nature as those described in the chattel mortgage referred to in the complaint herein which were purchased by the said Vogt after the execution of the said mortgage should be mortgaged to these defendants Frank as security for the indebtedness of the defendant Vogt to them and should be subject to the lien of said chattel mortgage; and in pursuance of said agreement prior to June
79 28th, 1902, some of such chattels were delivered to these defendants by said Vogt; and that if any of the chattels sold as described in said complaint were not specifically mentioned in said chattel mortgage, the same consisted of chattels acquired by these defendants under said agreement.

XI. These defendants further allege as a distinct and separate defense to this action that the agreement described in said complaint dated July 2nd, 1902, was executed on behalf of these de-
80 fendants Frank under duress, namely, because of an issue and service of a paper purporting to be an injunction, issued from the District Court of the United States for the Eastern District of the United States, forbidding the sale in the County of New York of the chattels referred to in said agreement, which paper purporting to be an injunction was served outside of the Eastern District

of New York and beyond the jurisdiction of said Court, but the existence of which prevented the sale of said chattels by these defendants Frank at public auction for the market value of the same. These defendants authorized the execution of said agreement under the mistaken belief that said paper purporting to be an injunction and the service thereof were valid; and under duress.

XII. These defendants further allege as a fur- 82
ther separate and distinct defense to this action that Arthur T. Stoutenburgh who claims to act as temporary receiver of the property of said Jacob Vogt and who was described in said agreement mentioned in the said complaint has never been discharged as such receiver, and that he is a necessary and indispensible party to this action.

XIII. These defendants further allege as a distinct and separate defense to this action that the People's Trust Company of Brooklyn is a Do- 83
mestic corporation and is a necessary and indispensable party to this action.

XIV. These defendants Frank further allege as a distinct and separate defense to this action that each and all of the persons who signed the said agreement described as Schedule B. in said complaint, namely John Wanamaker, James A. Hearn & Son, Adams Dry Goods Company and Joseph Vollkommer the older of that name are necessary and indispensable parties to this action. 84

WHEREFORE these defendants Frank demand judgment that the complaint be dismissed with costs and disbursements of this action.

ROGER FOSTER, Attorney for Defendants, Solon L. and Samuel Frank,

35 Wall Street, New York.

85 *Verification of Amended Answer.*

County of New York, ss:

Solon L. Frank, being duly sworn deposes and says: I am one of the defendants herein. I have read the foregoing answer, and the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe the same to be true.

SOLON L. FRANK.

86 Sworn to before me this 16th day of February, 1903. W. S. Beckley, Notary Public N. Y. Co.
(Notarial Seal.)

County of New York, ss:

Samuel Frank, being duly sworn deposes and says: I am one of the defendants herein. I have read the foregoing answer, and the same is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief,
87 and as to those matters, I believe the same to be true.

SAMUEL FRANK.

Sworn to before me this 16th day of February, 1903. W. S. Beckley, Notary Public, N. Y. Co.
(Notarial Seal.)

89

Decision.

SUPREME COURT.—County of Kings.

Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt,

Plaintiff,

against

Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank and Jacob Vogt,

Defendants.

90

91

This cause having been tried by the Court without a jury upon the issues of fact joined herein, at a Special Term for Trials, held in the County Court House in the County of Kings, in the Borough of Brooklyn, City and State of New York, on the 16th and 17th days of June, 1903; and the proofs and allegations of the respective parties, and the arguments of counsel having been heard and duly considered, I do make and file this decision, stating concisely the grounds upon which the issues have been decided. Plaintiff is entitled to a judgment declaring null and void a certain chattel mortgage executed by Jacob Vogt of the Borough of Brooklyn, County of Kings, State of New York, to the above named defendants Solon L. Frank and Samuel Frank of the City of New York, dated April 16th, 1902, to secure the sum of $8,500 with legal interest, and filed in the office

92

93 *Decision.*

of the Register of the County of Kings, April 18th, 1902 and marked as No. 11230; directing said Register to cancel the said chattel mortgage of record and declaring that the same is no lien upon the moneys, viz: $5,481.47 deposited on July 9th, 1902 by Arthur T. Stoutenburgh, temporary receiver, in the Peoples' Trust Company of Brooklyn, New York, under an order of the District
94 Court of the United States for the Eastern District of New York made July 2nd, 1902.

The Grounds upon which the issues have been decided are as follows: Said mortgage was made with the intent and purpose of said Vogt and said defendants Frank to hinder, defeat, defraud and delay said Vogt's creditors.

Let judgment be entered by the Clerk in conformity with this decision and granting costs to plaintiff to be taxed and an extra allowance of
95 5% upon the fund mentioned in the complaint, to-wit, the sum of $5,481.47.

Dated, Brooklyn, N. Y., July 9, 1903.

J. T. MAREAN, Justice of the Supreme Court.

97

Judgment.

At a Special Term for Trials of the Supreme Court, held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, in said County on the 20th day of July, 1903.

Present: Hon. JOSIAH T. MAREAN, Justice. 98

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt,

Plaintiff,

against

SOLON L. FRANK and SAMUEL FRANK, doing business as S. L. & S. Frank, and JACOB VOGT,

Defendants. 99

The issues in this action having been regularly brought on for trial before Mr. Justice Josiah T. Marean at a Special Term for Trials of this Court held in the month of June, 1903, at the County Court House in the Borough of Brooklyn 100 in the County of Kings, and the Court having heard the requests and proofs and allegations of the parties and arguments of counsel, and after due deliberation having been duly made and filed on the 16th day of July, 1903, a decision in writing in favor of plaintiff and against the defendants, therein concisely stating the grounds upon

101 *Judgment.*

which the issues were decided and directing judgment as hereinafter stated, and the plaintiff's costs having been duly taxed, NOW on motion of Francis B. Mullin, Esq., plaintiff's attorney it is

ORDERED, ADJUDGED and DECREED that the chattel mortgage executed and delivered by Jacob Vogt of the Borough of Brooklyn, County
102 of Kings, to the above named defendants Solon L. Frank and Samuel Frank of the City and State of New York, April 16th, 1902, to secure the sum of $8,500 with legal interest and filed in the Office of the Register of the County of Kings, April 18th, 1902, as No. 11,230, be, and the same hereby is annulled and declared void and of no effect. That said Register upon receiving a certified copy of this judgment cancel the said chattel mortgage of record and that the said chattel mortgage be
103 and the same is hereby adjudged and declared to be no lien upon the moneys, viz. $5,481.47 deposited on July 9th, 1902, by Arthur T. Stoutenburgh in the Peoples' Trust Company of Brooklyn, N. Y., under an order of the District Court of the United States for the Eastern District of New York, made July 2nd, 1902. And it is further

ADJUDGED AND DECREED that the plaintiff, Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the estate of Jacob Vogt, bankrupt, re-
104 cover of the defendant, Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, the sum of $457.94, his costs and disbursements of this action, and that he have execution therefor.

ENTER. J. T. M.

Chas. T. Hartzheim, Clerk.

105

Exceptions.

SUPREME COURT.—County of Kings.

Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an alleged Bankrupt,

Plaintiff,

against

Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank and Jacob Vogt,

Defendants.

106

DEFENDANTS' FRANK NOTICE OF EXCEPTIONS.

107

The above named defendants Solon L. Frank and Samuel Frank, and each of them, by their attorney, Roger Foster, saving and reserving all objections to the manner and form of the decision of the Court not hereinafter specified, make and file the following exceptions to the same.

I. The said defendants Frank and each of them except to the decision of the Court herein, dated July 9th, 1903, and filed in the office of the Clerk of the County of Kings on July 9th, 1903, and to each and every part thereof.

108

II. The said defendants Frank and each of them except to so much of said decision as finds that "Plaintiff is entitled to a judgment declaring null "and void a certain chattel mortgage executed by "Jacob Vogt of the Borough of Brooklyn, County "of Kings, State of New York, to the above named "defendants Solon L. Frank and Samuel Frank of "the City of New York, dated April 16th, 1902, to

109 *Exceptions.*

"secure the sum of $8,500, with legal interest, and "filed in the office of the Register of the County of "Kings, April 18th, 1902, and marked as No. 11,- "230," and to each and every part of said finding.

III. The said defendants Frank and each of them except to so much of said decision as finds that plaintiff is entitled to a judgment "directing said "register to cancel the said chattel mortgage of
110 "record and declaring that the same is no lien "upon the moneys viz, $5,481.47 deposited on July "9th, 1902, by Arthur T. Stoutenburgh, temporary "receiver in the Peoples' Trust Company of "Brooklyn, New York, under an order of the "District Court of the United States for the East- "ern District of New York, made July 2nd, 1902," and to each and every part of said finding.

IV. The said defendants Frank and each of them, except to so much of said decision as finds
111 that "said mortgage was made with the intent and "purpose of said Vogt and said defendants Frank "to hinder, defeat, defraud and delay said Vogt's "creditors" and to each and every part of said finding.

V. The said defendants Frank, and each of them, except to so much of said decision as finds that "Judgment be entered by the Clerk in con- "formity with this decision and granting costs to "plaintiff to be taxed, and an extra allowance of
112 "5% upon the fund mentioned in the complaint to- "wit, the sum of $5,481.47" and to each and every part of said finding.

Dated, New York, July 31, 1903.

ROGER FOSTER, Attorney for Defendants Solon L. & Samuel Frank.

To: Francis B. Mullin, Esq., Attorney for Plaintiff, 44 Court Street, Brooklyn, N. Y.

To: Mr. Charles T. Hartzheim, Clerk of the County of Kings, Borough of Brooklyn, N. Y.

113

Opinion.

SUPREME COURT.—County of Kings.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt,

Plaintiff,

against

SOLON L. FRANK and SAMUEL FRANK, doing business as S. L. and S. Frank, and Jacob Vogt,

Defendants.

114

115

MAREAN, J.

As the fund is already in the Bankruptcy Court which must distribute it and for that purpose may in the Bankruptcy proceeding ascertain and declare the rights of creditors therein, I shall entertain the action not to determine right in the fund, but only to set aside the chattel mortgage as made to hinder, defeat, defraud or delay creditors, a relief which could not perhaps be afforded in the bankruptcy proceedings.

116

I am satisfied that the mortgage in question was made with the understanding that the mortgagor was permitted to make any disposition of the mortgaged property he saw fit and apply the proceeds to his own use, exactly as though the mortgage had not been made. This was actually done to a considerable extent without any protest or criticism on the part of the mortgagees and apparently as

a matter of course. Such a mortgage to the extent of such disposition by the mortgagor serves no purpose of security to the mortgagees or any purpose other than the cover of the property from creditors until it can be disposed of. This with other circumstances which the case presents leads me to the conclusion that the mortgage was made with intent on the part of both mortgagor and
118 mortgagees to hinder, defeat, defraud and delay creditors and that it should be set aside and declared void.

Judgment accordingly with costs.

Notice of Appeal.

SUPREME COURT.—County of Kings.

119

Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an alleged Bankrupt,

Plaintiff,

against

Solon L. Frank and Samuel Frank, doing business under
120 the name of S. L. & S. Frank and Jacob Vogt,

Defendants.

Please take notice that the above named defendants Frank hereby appeal to the Appellate Division of the Supreme Court of the State of New

York for the Second Judicial Department from the judgment of this court herein dated the 20th day of July, 1903, and entered in the office of the Clerk of the County of Kings on the 21st day of July, 1903, and from each and every part of said judgment.

Dated, New York, July 24, 1903.

ROGER FOSTER, Attorney for Solon L. Frank and Samuel Frank, 35 Wall Street, New York. 122

To: Francis B. Mullin, Esq., Attorney for plaintiff, 44 Court Street, Brooklyn, N. Y.

Mr. Charles T. Hartzheim, Clerk of the County of Kings.

Case on Appeal.

The trial was begun before Honorable Justice Marean on June 16th, 1903. WILLIAM H. HAMILTON and F. B. MULLIN, Esq., appeared for the plaintiff and ROGER FOSTER, Esq., appeared for the defendants Frank. 123

This case having been called for trial, Mr. Hamilton for plaintiff states the cause of action on behalf of his client.

Mr. Foster: On behalf of the two defendants Frank, I move to dismiss the complaint on the grounds: First; that it does not state facts sufficient to constitute a cause of action: Second, it appears that the plaintiff has an adequate remedy at law and the complaint does not state facts sufficient to justify the interposition of a court of equity and to try this case in equity would be a denial of the constitutional right of the defendants Frank to a trial by Jury; Third, this Court has 124

no jurisdiction, since this is a suit brought to determine a title to property in the possession of the United States District Court; Fourth, there is a defect of parties inasmuch as the receiver in Bankruptcy, who has not been discharged, is not a party to the action, nor is the Trust Company which holds the money which the plaintiff seeks to reach a party to the action, nor is any one except the de-
126 fendants' Frank who is a party to the stipulation by which this money was deposited in the Trust Company, made a party to this action except the defendants Frank, and the defendant Vogt.

The Court: In whose name is the account in the Trust Company?

Mr. Foster: In the name of the United States District Court. I understand this is a suit brought to determine the title to the fund in the possession of the court of Bankruptcy. They claim our rights
127 are void because of the chattel mortgage which they claim is void for usury, and establishes a fraud under the Bankrupt Act.

The Court: I will try it as an action to declare the chattel mortgage void.

JACOB VOGT, a witness on behalf of the plaintiff, testified as follows, in answer to Mr. Hamilton. Direct-examination:

128 I live at 307 Hewes Street, Brooklyn. In April, 1902, I was in the express business. I was delivering dry goods for retail dry goods houses in New York, in Brooklyn and on Long Island, delivering C. O. D. parcels for various department stores. I had as part of my business at that time horses, wagons and trucks. I had fifty-eight horses and mules altogether. I had six trucks and twelve

delivery wagons what was my own, at 850 and 852 Atlantic Avenue, my stable. I lived next door to the stable, 852 Atlantic Avenue. I had been engaged in the express business about six years. I had known the defendants, Frank since I started the business. They were and are in the horse business at 24th Street near Lexington Avenue, Manhattan. They are dealers in horses. Their names are Solon and Samuel, two brothers. Before 130
April, 1902, I purchased horses of them. I do not know the exact amount I owed them at that time. I know approximately. I did not have any talk with them about the amount I owed them, at the time the chattel mortgage was given. They made no statement to me at any time of my account with them.

Q. Do you remember having an interview with either of the Franks before the making of the chattel mortgage in April, 1902? A. Yes, sir, in 131
Franks' office, they only have one office, they are together, about a week before the chattel mortgage was made. That was with Sam Frank. I remember some of what was said on that occasion.

Q. Will you state all that you remember? A. I was sued by two men down in South Brooklyn that one of my drivers knocked down.

Mr. Foster objected to that it is not the best evidence, that it is incompetent, irrel- 132
evant and immaterial.

The Court: Go on, the question is not the details of that suit, but the fact that some one sued him for personal injuries growing out of an accident. Objection overruled.

Defendants Frank except.

The Witness: (Continuing), there was two men sued me for five thousand dollars each, and one

133 *Jacob Vogt.*

man named McCormick for ten thousand dollars. They claimed they had been hurt by my driver. I don't know the name of the other man.

Q. Was it Donohue?

Mr. Foster: Objected to on the ground that the best evidence is the pleading. Objection overruled; defendants Frank except.

A. Yes, that was the name of one of them.

134 Q. What did you do, did you show him any papers? A. I showed Mr. Frank the papers. These are the papers I showed him. They were served on me.

Q. These are dated in November and December of the previous year. Will you look at the three summons and complaints and tell which of the three were spoken of at the time you talked with the Franks? A. These two here. One the Donohue case and the other the Kinsella case.

135 Plaintiff offered in evidence the summons and complaint both dated in November, 1901, in an action in the Supreme Court for Kings County by Donohue as plaintiff against Jacob Vogt, defendant to recover $5,000.00 for the alleged negligence of a driver of defendant.

Objected to by defendants Frank as irrelevant and incompetent. Objection overruled. Exception to defendants Frank.

Plaintiff offered in evidence the summons

136 and complaint dated in November, 1901, in an action in the Supreme Court for Kings County by Kinsella as plaintiff against the same defendant to recover $5,000.00 for the alleged negligence of a driver of defendant.

Same objection, ruling and exception.

Both papers marked Plaintiff's Exhibit 1.

The Court: They are not offered to prove indebtedness, but to indicate what the subject of the action was.

Plaintiff's Exhibit 1a. Summons.

SUPREME COURT—KINGS COUNTY.

PATRICK O'DONOHUE,
Plaintiff,
against 138
JACOB VOGT,
Defendant.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your 139 failure to appear or answer, Judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, December 2, 1901.

ELLIOTT, JONES & ESCHER, Plaintiff's Attorneys, Office and Post Office Address, 215 Montague Street, Brooklyn, N. Y.

141 *Plaintiff's Exhibit 1 a—Complaint.*

Complaint.

SUPREME COURT—KINGS COUNTY.

PATRICK O'DONOHUE,
Plaintiff,

142 against

JACOB VOGT,
Defendant.

The complaint of the plaintiff respectfully shows:

1. That at all the times hereinafter mentioned, the defendant was and still is the owner or lessee and in possession of certain horses and wagons
143 used by him in the conduct of an express business in the Borough of Brooklyn, City of New York, County of Kings and State of New York.

II. That on or about the 30th day of November, 1901, while plaintiff was lawfully passing over and upon 12th Street at or near 5th Avenue in the Borough of Brooklyn, aforesaid, and without any fault on his part, but solely through the fault, carelessness and negligence and incompetency of the agents and servants of the defendant, a horse
144 and wagon in the control of the defendant was allowed to collide with great force and velocity with the plaintiff, thereby severely and seriously injuring him in and about the head and body.

III. That by reason of the premises aforesaid plaintiff was made sick, sore and lame and caused to suffer and still suffers great bodily pain, and has been and will be put to great expense for med-

ical aid and attendance, and has been and will be prevented from attending to his business, thereby losing his wages therefor, and as he is informed and believes he has been permanently injured, all of which is to his great damage Five thousand. dollars.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of five thousand dollars, besides the costs and disbursements 146 of this action.

ELLIOTT, JONES & ESCHER, Attorneys for Plaintiff, 215 Montague Street, Brooklyn, N. Y.

City of New York,
Borough of Brooklyn, } ss:
County of Kings,

Patrick O'Donohue, being duly sworn, says he is the plaintiff in this action; that he has read the 147 foregoing complaint; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

PATRICK O'DONOHUE,

Sworn to before me this 2nd day of December, 1901. J. S. Morton, Commissioner of Deeds, City of New York, Residing in Borough of Brooklyn.

149

Plaintiff's Exhibit 1b. Summons.

SUPREME COURT—KINGS COUNTY.

THOMAS B. KINSELLA,
Plaintiff,

150 against

JACOB VOGT,
Defendant.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within
151 twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, Judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, December 2, 1901.

ELLIOTT, JONES & ESCHER, Plaintiff's Attorneys, Office and Post Office Address, 215 Montague Street, Brooklyn, N. Y.

Plaintiff's Exhibit 1 b—Complaint. 153

Complaint.

SUPREME COURT—KINGS COUNTY.

THOMAS B. KINSELLA,
Plaintiff,
against
JACOB VOGT,
Defendant.

154

The Complaint of the plaintiff respectfully shows:

I. That at all the times hereinafter mentioned, the defendant was and still is the owner or lessee and in possession of certain horses and wagons, used by him in the conduct of an express business in the Borough of Brooklyn, City of New York, County of Kings and State of New York.

155

II. That on or about the 30th day of November, 1901, while plaintiff was lawfully passing over and upon 12th Street at or near 5th Avenue in the Borough of Brooklyn aforesaid, and without any fault on his part, but solely through the fault, carelessness and negligence and incompetency of the agents and servants of the defendant, a horse and wagon in the control of the defendant was allowed to collide with great force and velocity with the plaintiff, thereby severely and seriously injuring him in and about the head and body.

156

III. That by reason of the premises aforesaid, plaintiff was made sick, sore and lame and caused to suffer and still suffers great bodily pain, and has been and will be put to great expense for medical aid and attendance and has been and will be

157 *Jacob Vogt.*

prevented from attending to his business, thereby losing his wages therefor, and as he is informed and believes he has been permanently injured, all of which is to his great damage Five thousand dollars.

WHEREFORE, plaintiff demands judgment aginst the defendant for the sum of Five thousand dollars, besides the costs and disbursements
158 of this action.

ELLIOTT, JONES & ESCHER, Attorneys for Plaintiff, 215 Montague Street, Brooklyn. N. Y.

City of New York,
Borough of Brooklyn, } ss:
County of Kings,

Thomas B. Kinsella, being duly sworn, says he is the plaintiff in this action; that he has read the
159 foregoing complaint; that the same is true of his own knowledge, except as to the matters therein stated to be allegd upon information and belief, and as to those matters he belives it to be true.

THOMAS P. KINSELLA.

Sworn to before me this 2nd day of December, 1901. J. S. Morton, Commissioner of Deeds, City of New York, Residing in Borough of Brooklyn.

160

Q. What was said by you to Sam Frank with reference to this on the occasion you told me Sam Frank was there? A. I told Sam Frank I was sued by the two men, he said: "Oh that don't make much difference," he said "have you given it to any attorney yet;" I said, I told Mr. Halpin about it and Mr. Frank said to me why didn't you give them to Mr. Thompson, I said it is too late

now, I would, if I was thinking about it before. Mr. Thompson is a lawyer at 63 Wall Street, J. Campbell Thompson.

Q. Do you know who Thompson was. Did he tell you who Thompson was?

Objected to. Objection overruled. Defendants Frank except.

A. He introduced me to Mr. Thompson as an attorney. That conversation was had that I just re- 162
ferred to with Frank about a week or ten days before the mortgage was made.

Q. You executed this chattel mortgage which is annexed to the complaint? A. Yes, sir.

Q. With whom did you speak about executing the mortgage? A. I spoke to Mr. Frank.

Q. To Sam Frank? A. Yes, sir.

Q. What did he say? A. He said, you had better make a mortgage out.

Q. When did he tell you that? A. He told me 163
one or two days before, to come over some afternoon.

Q. You had been in the habit of going there? A. Yes, sir.

Q. What did you do? A. Mr. Frank sent for Duell, a notary Public to write out the chattel mortgage.

Q. Was it written out while you were there? A. Yes, I was not in the office, I was outside, Mr. Duell was all alone. 164

Q. Do you know the amount mentioned in that chattel mortgage? A. Eighty-five hundred dollars.

Q. How was that amount arrived at between you and Sam Frank? A. We figured it up, Frank and me, about what it would be worth, the horses, wagons and harness, and we put a mortgage on the value of them.

Q. You figured up about what the whole thing would be worth? A. Yes, sir.

Q. What was said, if anything, about the amount owed him?

Objected to on the ground that the witness cannot contradict himself, having already said nothing was said.

A. There was nothing said.

Q. What was said as to the amount that was put in the mortgage? A. We were talking about making it $8,500 on account of them lawsuits I had against me and to protect Frank and myself.

Q. Tell all that was said between you and Frank on the subject? A. Mr. Frank told me, if you make the mortgage $8,500, if they do sue you and get a judgment against you, they cannot get nothing, I have a mortgage on everything you have got.

By the Court: Did he tell you you owed him $8,500?

Q. Did you tell him you owed him $8,500? A. No.

Q. Was anything said about how much you owed him? A. No, sir.

Mr. Hamilton: I call upon the other side to introduce whatever notes they have of Mr. Vogt's.

The Court: They are not bound to produce anything unless you specify what particular notes you want.

Q. How was this indebtedness that you owed to the Franks represented? A. By promissory notes.

Q. You did not owe them anything on book account? A. No.

Q. Whenever you bought anything from them did you give them notes? A. Sometimes notes, sometimes a check.

Q. Sometimes not until the next day? A. About the time.

Q. You always paid them by check or gave them a note? A. Yes, sir.

Q. All you owed them was represented by notes of yours which they held? A. Yes, sir.

By Mr. Hamilton: Q. After giving them this mortgage you continued on in the same business? A. Yes, sir. 170

Q. How long a time? A. To the 25th of June, the same year.

Q. What is the date of the mortgage? A. The 16th of April, 1902.

Q. What happened on the 28th of June? A. On the 26th or 27th of June, 1902, I cannot exactly remember which day it was, I told Mr. Frank that my business was not paying any more, and I was losing money. He said "sell it," and I telephoned to the Bond Company on the 28th, the 171 United States Guarantee Company bonded me for all them dry goods houses I worked for; they came over and looked through my accounts how they stood, and they found out I was short and I told them I could not go on that way, they said, "all right, you had better close up;" the Bond Company said "you had better stop doing business if you cannot make it up; I think that was on the 27th of June, 1902. I told Mr. Frank about it in the afternoon and on the 28th I did not send 172 my trucks out to get any more goods from New York. I shut the doors and Mr. Frank sent the Marshal over to take charge of the stable.

Q. Between that time and the time you had made the mortgage, what had become of many of those horses? A. Some of them died, and some of them were played out and sold.

I have got a memorandum of the new horses I bought.

173 *Jacob Vogt.*

I can remember some without referring to the memorandum, I can remember six horses I bought of Benjamin Weil, on North Seventh Street, Brooklyn, about May 5th, or 6th. I bought six horses of Carroll in 24th Street, New York, I bought two mules of Henry Meise, 24th Street, New York, I bought two mules of David Newman of Rutledge Street, Brooklyn, I bought two mules
174 of Volkommer & Company, six mules altogether. I bought some horses of Mr. Frank, I remember three, two coach horses and a bay horse. I either gave a note or a check, I don't remember. I have figured up about eighteen or twenty horses I acquired between the time I gave the mortgage and the time they sold me out. That includes the mules. I have a memorandum that will enable me to more accurately tell the number.

Q. Referring to your memorandum how many
175 were there?

Mr. Foster: I object to the use of a memorandum unless it is shown that the memorandum was prepared at the time.

Objection overruled. The paper is marked for identification Number 3.

Defendants Frank except.

PRELIMINARY-CROSS-EXAMINATION by Mr. Foster:

176 I prepared this paper three or four weeks ago. I went to find out how many horses I bought. I wrote it down in Mr. Carroll's place. I went to different people and asked to see their books.

Q. And this paper consists of the statements of what you found on the books of those who sold you horses, is not that it?

By the Court: Q. Having seen that paper do you remember now the fact that you bought the horses of the particular persons that you have

mentioned? A. Yes, I remember every horse, the color and so on.

I can see them running from me. I had so many horses I cannot keep them all in my head. I can tell you how many horses I bought from Carroll, from April 16 to June 28. I have no recollection about the price except what I got from the books. If I had not seen the books I would not know the price of some of them. I guess the brown horse 178
were $285, I ain't positive. Without this memorandum I cannot give some figures, I remember they were around $200.

Q. Your recollection is rather hazy on that?

Objected to. Objection sustained. Defendants Frank except.

Q. You have given all your recollections on the subject now?

Objected to. Objection sustained. Defendants Frank except. 179

The Court: He is not bound to answer that.

Without this memorandum I can testify accurately how many horses I bought of different people, between the 16th of April and the 28th of June, I can so far as I wrote down.

Q. You did not have to write down this memorandum in order to testify accurately?

The Court: He has already testified to fifteen horses and six mules. 180

I might be mistaken in the color. I remember the horses right away—when I don't know the colors on the books.

DIRECT-EXAMINATION resumed by Mr. Hamilton:

Three of the new horses I bought were coach horses, but I forgot all about them; I did not

count them. I bought one of these horses, a sorrel horse, of Joe Keyser, about May 5, 1902. I bought the other of Mr. Frank after April 16, 1902. Besides these, I bought two other horses of Mr. Frank between the mortgage and the sale. I bought more than five horses of Mr. Frank after the 16th of April; some I can't remember; I bought horses all the time. After April 16, I acquired in
182 one way or another, from different people 24 horses and mules; it might be more. I have testified to 24 including the mules. I have bought and sold horses for a number of years. I know the value of those new horses and mules. I remember the kind of horses they were,—their size and character, and their qualities. I am able to place a value on those horses.

The Court: You are proceeding against the fund; you agreed the horses should be
183 turned into money and it does not matter what they are worth, or what they sold for.

Q. In the chattel mortgage there are fifty-one horses included; do you remember that? A. I don't remember. I cannot recollect the exact amount of horses included in the chattel mortgage I had in my place on the 28th of June, how many had been sold and traded away or had died.

To the Court: I cannot recollect approximately; by approximately I mean positively. I do re-
184 member pretty near how many.

By Mr. Hamilton: Q. To the best of your recollection how many had been traded away, sold or died?

Objected to as irrelevant, immaterial and incompetent. Objection overruled. Defendants Frank except.

A. About 25.

Q. Was anything said between you and Frank as to taking all this stuff over to his place, or to

an auction room? A. He told me he was going to sell it. The time he took the horses away I was not there; my foreman was there.

Q. How many did you leave there on the 28th? A. I had altogether, mules and horses, 58 head, and six horses I had turned out in the country for the summer; that left 52 there. I sent a man to get them six horses back. He only brough back four. The man would not give him the other two. 186
Those four horses went into the stable; that made 56 there. Then Mr. Frank sent for a pair of coach horses—sent a man for a pair of coach horses the day before that, the day before I closed up business. I don't think they were included in the mortgage the day I made it. They could not be in there. He said they would send for them. They were a different class of horse altogether. Mr. Frank told me he was going to sell those coach horses; that is all I ever heard of them since. They 187
were not sold at the auction sale. I was not there on the day those horses went away. I bought the two coach horses of Mr. Frank after the chattel mortgage was made.

One I think I got of Mr. Frank and the other of Joe Keyser. When those horses were taken I was at 169 Street and Jerome Avenue, living there then. I moved there on the 29th or 30th of June, 1902. On the 28th Frank sent his man to take charge of the stable. I saw the man there. He 188
came over the day before. Frank told me he would send a man over to take the two carriage horses. He told me he was coming over to see me. I went to see him almost every day. I called upon Mr. Frank about three times a week while I was in business. I was in New York every day. When I made these calls upon Mr. Frank, I told Mr. Frank I was losing money, some time before that.

Several times. I told him that I was losing money in my business. I told him the reason that I was losing money was that feed was very high at the time. He said go on, I will help you out. I think it was in February, 1902, he told me to advertise my business for sale. Mr. Frank wrote the advertisement out, I took it down to the Herald. I did not attend the sale. When that sale occurred
190 I was in 169th Street and Jerome Avenue. I had a talk with Sam Frank on the night before the sale was supposed to take place; I think it was that night, the sale was to occur on the first this was on June 30. I remember that. I know it stopped. That it occurred on July 3. I saw Frank outside of lawyer Thompson's flat on Riverside drive.

Q. Lawyer Thompson? A. Yes, sir.

Q. Where? A. Riverside Drive and 98th
191 Street.

Q. Were you in Thompson's flat? A. Yes, sir.

Q. Did you stay there all day in Thompson's flat? A. Yes, sir.

Q. Were you then working for Thompson? A. Not yet.

Q. Later on you began working for him? A. Yes, sir.

Q. Where did you work for Thompson, upon his farm? A. Yes, sir.

192 Q. Where is that? A. Harrison, Westchester County, N. Y.

Q. Come back to this occasion in the flat, did Mr. Thompson and Mr. Frank call to see you there? A. Yes, sir.

Q. What was said between you and Mr. Frank?

A. I was upstairs in Mr. Thompson's flat and the elevator boy came up.

Q. You went down on the elevator? A. Yes, sir.

Q. Did you see Frank? A. Yes, sir.

Q. Who else? A. Mr. Thompson.

Q. Were they in a carriage? A. Yes, sir.

Q. They had driven up to the door? A. Yes, sir.

Q. State what was said between you and Mr. Frank? A. Mr. Frank said to me "You said that those coach horses you had over there on commis- 194
sion—

Defendants Frank object. Objection overruled. Defendants Frank except.

The witness (continuing): You say if anybody asks you for those carriage horses and the harness you had in Brooklyn on commission to sell you returned them to me.

Q. What else did he say? A. He said the best thing for you to do is to go to Mr. Thompson's place, keep out of the way, I will keep you up. 195

Q. The Thompson he referred to was this lawyer who was there at the time? A. Yes, sir.

By the Court: Q. For you to go to Thompson's place in the country, do you mean? A. Yes, sir.

By Mr. Hamilton: Q. Did he ask you to sign an agreement about this? A. He asked me whether I would make an agreement that way; I did not want to say yes, I did not want to say no, I do not remember what his words were he say he want me.

Q. What did he say about your signing any 196
paper as to how these horses were in your care at your place? A. He asked me whether I would sign an agreement.

Q. Did he show you any paper? A. No.

Q. Was this talk in the presence of Mr. Thompson? A. He stood on the sidewalk, but he walked a few steps away.

Q. When you began to talk with Frank, Thompson walked away a little? A. Yes, sir.

By Mr. Foster: Q. Thompson did not hear the talk? A. He walked away few steps.

By Mr. Hamilton: Q. What did Frank say about putting you in business in 174th Street? A. He said "When everything is all right he would put me up there in the livery stable business.

Q. Did you go and look at the livery stable? A. Yes, sir.

198 Q. Did Frank go with you to look at the livery stable, or tell you about it? A. He told me about it.

Q. Where was it? A. At 174th Street and Jerome Avenue.

Q. When did he tell you that he would do that for you? A. About two days before he closed up my business, he told me, the same day he met me at Thompson's.

Motion to strike out denied. Defendants

199 Frank except.

Q. What did you say to Frank in response to his request to sign the paper and make a certain statement about having these things on commission, what did you tell him after that; what else was said at that interview at this flat? A. That is about all.

Q. That night you stayed at the flat? A. No.

Q. Where did you go? A. To Mr. Thompson's farm.

200 Q. Did you take your family? A. I went with Mr. Thompson.

Q. Your wife and family were in your own flat? A. Yes, sir.

Q. You had been to your own flat? A. Yes, sir.

Q. Your family followed you to Harrison later? A. Yes, sir.

Q. How soon afterwards? A. About two weeks.

Q. How long did you stay at Harrison? A. Until January 15, 1903.

Q. When were you brought back by the United States Marshal? A. No, that was before that; I moved back myself. 201

Q. When you moved from Atlantic Avenue, did you observe anybody watching you? A. Yes, sir.

Q. Did you have a couple of vans that moved your furniture and things? A. Yes, sir.

Q. What did you do, if anything, to escape detection? 202

Objected to as leading and irrelevant.

Since this suit was brought I have had a talk with you and Mr. Mullin. I have prepared and examined the amounts I owed to various people when I made this mortgage. At the time I owed Vollkommer & Company. Their business is hay, feed and horses. I also owed L. F. Barrett, the horseshoer; William Gleischman, feedman.

The amounts of the dry goods houses I cannot tell. I knew I was indebted to them in various 203 sums among those people were H. O'Neil & Company and Daniell, John Wanamaker, Siegel Cooper & Company, Stern Bros., Erich Bros., Adams & Company, O'Neils, Rothenburg, John Daniell & Sons, and Vantine. I owned no other property when this chattel mortgage was given, beyond the contents of my stable. I did not have any cash; might have had some in the bank, but it did not belong to me. I cannot tell how much I had in the bank. Whatever it was it did not belong to me. 204 It belonged to the drygoods men.

Q. Will you tell the Court, what, if anything, was said at any time by you to the Franks, or the Franks to you about your owing other people.

Objected to as leading and also as irrelevant. Objection overruled. Defendants Frank except.

A. Sometime before the chattel mortgage in April—

The Court: He has already stated that he was losing money.

Q. Had you said anything to the Franks prior to the time of making the chattel mortgage, had you said anything to the Franks about your financial condition? A. Yes, sir. I borrowed money off of them sometimes to pay other creditors when I was short. They had lent it to me. I had not exactly told them I was not worth enough to pay my debts. I did not tell them that, no, sir. I told them I was short, quite often. I might have told them to whom I was short, I cannot remember; the payments I remember. I remember oftentimes I was short to pay the men on Saturday night and I borrowed money of Mr. Frank to pay them. I know the value of those horses.

Q. What was the value of the horses you bought after the 16th of April, horses and mules?

Objected to upon the ground that the witness is not competent to give an opinion as to value. Objection overruled; defendants Frank except.

A. About forty-five hundred dollars, between four thousand and $4,500. Those are two of the horses I bought after the chattel mortgage was made, three coach horses included. It included the mules. I can tell the value of all those horses and mules, new horses and mules, excluding the coach horses, excluding the Vollkommer mules too. That left about thirty-five hundred dollars, the coach horses were worth about five hundred dollars each.

CROSS-EXAMINATION by Mr. Foster:

I am in the employ of Vollkommer and Company. I think the members of the firm are Mr. Vollkommer and his son. This plaintiff is one of that firm. I have been in their employ since the 15th of January, this year. Mr. Thompson has a stock farm; horses,carriages and harness; I did driving and had charge of horses, a matter which I have been doing a good many years. When my 210
business was closed up I did not tell Mr .Thompson I needed support. I told him I wasn't doing anything. He asked me "what are you going to do?" I said, I did not know. He said "you come up to my farm." I might have told him I needed a place. I have known him for about two years. He had acted as my lawyer in some matters.

Q. And you told him you needed a place where you could get something to do to support your family and he said to go up on his farm; is that 211
so? A. No. I might have told him I wanted a place, but I did not ask him to get me a job. There was a place for me up there and I went to work there. I do not remember that one day while I was up there, I was stopped by two men with pistols. No Deputy Marshal drew a pistol on me I am positive. I did not see none. I was arrested. I do not think I was in prison. I was in the Post Office building about 15 minutes.

Nobody came to see me there. The Marshal took 212
me to Brooklyn. When the Marshal arrested me, Mr. Benedict from the United States Guarantee Company was with him. That is the Company for which Mr. Yawger is counsel. Nothing was said that day about a criminal prosecution. I don't believe it was ever said. I gave bail.

The Court: What was he arrested for?

Mr. Hamilton: A civil arrest and held for ex-

amination. The witness (continuing): I don't know whether I have been indicted or not. I first suggested my employment by Vollkommer & Company. I had not been discharged by Mr. Thompson. I was in Mr. Thompson's employ. I did not know that Mr. Vollkommer was one of the trustees in bankruptcy for my estate at the time he employed me. I had a lawyer
214 in this matter. I was before the referee twice, I was not there at the meeting before the referee when the vote took place to appoint a trustee, that day. I was told that Mr. Vollkommer was trustee in bankruptcy. I was not told that before the first of January, this year. I think I was a week at Vollkommer's when I was told. Nothing was said about my testifying in this case. I have talked it over with Mr. Mullin. First about two or three months ago. Two months or so after I had been
215 in Mr. Vollkommer's employ. I am paid there $25 a week. I was paid by Mr. Thompson fifteen dollars. He gave me my house rent, that is all. Yes, gave us the house, and paid me fifteen dollars a week. Now I am paid twenty-five dollars a week and furnish my own house. I made the change because I did not like it up there. I get no commission from Mr. Thompson.

Q. Why did you pick out Vollkommer? A. I wanted a place to sell horses, to get a sales stable,
216 to get a job. I did not know that he was trustee in bankruptcy. It was not a surprise to me to be told that his son was trustee in bankruptcy. I don't think it would make any difference. I made no contract as to how long I shall be employed. I spoke to Mr. Frank when I was served with the Donohue and Kinsella papers first and afterwards. I cannot exactly tell how long afterwards, I know I spoke to him several times, because I was worried about it. I spoke to him as soon as the papers were served and several times afterwards.

Q. What did he say? What did you say to him? A. Sometimes I told him I wish that suit was over. I testified to a conversation that I had with Mr. Frank in which he referred to me making this chattel martgage in order to protect me against these actions. I had those conversations after those suits were brought. I cannot tell how long after I had that talk with Frank in which he suggested that I should make this chattel mortgage. 218
I think it was about two or three weeks before I made the mortgage. I forget how long it was after the suits were brought. A month or a month and a half. I testified before the referee in bankruptcy, concerning this transaction. Mr. Mullin examined me then.

The Court: You cannot read it in evidence here unless he says or some one says who knows that is what he says.

Q. Did you then testify as follows: Who asked 219
you to make the mortgage, and did you answer Frank. Did you testify to that? "What did they say when they asked you to make it? A. I have forgotten now." "Q. They merely asked you to make this mortgage as a renewal, is that all? A. That is about all." Was that your testimony? A. Yes, sir.

Q. Did you testify to the truth then? A. Yes, sir, I did not remember at the time I was thinking this over since. I remembered what I testified to 220
today before I took employment with Vollkommer. I remember it right after, up at the farm I remember that. I had not much to do there, I was thinking this thing over, sometimes I look over my papared what I had there.

Q. Do you remember this question: "Q. They called you up by telephone, didn't they? A. No. The old one ran out and I had to renew it." At

221 the time when this mortgage mentioned in the complaint was made, there was another outstanding chattel mortgage on my property given to the Frank Bros.?

Q. And that was the mortgage given for the amount of $3800?

Objected to as before: Same ruling and exception.

222 A. Yes, sir, covering all the property I had at the time that mortgage was given. I had been doing business with the Frank Brothers a good many years. They lent me money and sold me horses. For some years they had security on my property for whatever I owed them. It had not been agreed between us that the advances they made after the date of the chattel mortgage were to be covered by the chattel mortgage, not in regard to the $3800 mortgage.

223 By the Court: The $3800 mortgage was made up of what I owed them at that time. Might have been a little less, but somewhere near. The mortgage was secured by a note and the note showed how much I did owe. That mortgage had been made in June, 1901.

Q. At the time this chattel mortgage in 1902, was discussed, did you say anything about more money being needed from Franks, didn't you say anything to them and didn't they say they would

224 take care of you? A. I do not remember anything about that. They told me they would take care of me. It was not understood I needed some more money to keep on my business. As a matter of fact I think I did borrow more money from them afterwards, after this last chattel mortgage was executed. I cannot remember how much. I bought horses from them too. I cannot remember exactly whether they paid me some money at the time the

chattel mortgage was executed. They said that if I would do that they would take care of me. Afterwards I called them up on the telephone and told them that the bonding company thought I had better stop doing business. And they said they would send some one over to foreclose the mortgage and take possession of the horses and my stable here. I made no objection to their doing it. I told them they could do so. I told them that two or three 226 days before that.

Q. And you set your men at work wrapping up blankets and harness, so that the marshall could carry them over? A. I did not put them to work.

Q. A man wrapped them up? A. The men wrapped them up. I did not give any orders at all after the sheriff came in my stable. I had no objection to Frank doing that. I knew they were going to do it. They told me they would do it before they did it and I said it was all right. They told me 227 they were going to take all the horses away.

By the Court: I paid them for some of the horses I bought after the mortgage was made. Some I gave a note for some cash and some note. I think they advanced me money after the mortgage was given. Sometimes I gave them a check dated ahead a few days and sometimes a note. I gave one or the other whenever they let me have any money. They have got notes for everything I owed them. I paid some of the people from 228 whom I bought horses after the chattel mortgage was made in 1902, from what money I earned. None of it was advanced by the Franks.

Q. Was not some of it money you got on notes from the Franks? A. No. I am positive of that.

Mr. Foster: I will read from the testimony of Kinsella as plaintiff against the same defendant Mr. Vogt before the referee in bankruptcy Sep-

tember 26, 1902, at pages 11 and 12. "Q. What property did you employ in your business, what property did you have on hand about June 26th, 1902. A. How many horses? A. Any property? A. I had a lot of horses. Q. How many horses? A. Let me think how many horses I had in the stable that day. Q. Yes such as you did business with? A. I think it was about forty-two horses
230 there on that day." This was taken September 26, 1902. I remember trying to sell the business; I do not remember making an attempt to sell claims against people who employed me to deliver goods. I do not remember attempting to sell a claim against Wanamaker. I did not tell Mr. Frank that I would like him to buy a claim against Wanamaker. After the date of the chattel mortgage, I suppose I sold somewhere near 20 or 25 horses; some of them died; others got played out. I can-
231 not remember how many I sold.

Q. You mean to say that 20 of those horses were at the point of death at the time you made that chattel mortgage? A. Always at that time of the year 20 were at the point of death, they were not used to work.

Q. You said about 20? A. No, I cannot just remember how many I sold. I guess I sold about 10.

Q. Did you sell 15? A. I don't remember. I deposited the money in my bank; I don't remem-
232 ber now how much I got for them. I kept no books. I knew those horses were covered by the chattel mortgage given to the Frank Brothers. Mr. Frank gave me consent; some of them he bought of me himself. He did not tell me nothing what to do with the proceeds.

Q. He bought some and paid you cash for them? A. Sometimes.

Q. He bought some of the horses covered by this chattel mortgage and paid cash for them? A. Yes. He gave me a check.

Q. How many? A. I don't know.

Q. As many as twelve of them? A. What time?

Q. Between the time of that mortgage in April and the time it was foreclosed? A. I don't know if he bought any in between that time or not; I know he bought and sold. 234

Q. Do you know whether you sold any? A. Yes, I sold some.

Q. You sold as many as ten? A. Yes, sir. I think about ten died. Some of them were played out with the hot weather and colic. I cannot now describe the horses that died, I remember a bay and a gray and a brown, I can remember one of the horses that died was gray. One of the horses was about nine years old. I bought one of Mr. Frank two years previous to that. Mr. Frank gave con- 235 sent to sell some of those ten horses. He didn't tell me nothing to do with the money. He never told me what to do. He gave me customers to buy them off me. No, nothing was said about putting new horses in place. I had to, because I need them in my business. Nothing was said about new horses in place of those covered by the chattel mortgage. The Franks held a mortgage on my place of business about five or six years since I started. When I started I had one horse. I 236 had money for the first horse. The next I paid half and half I owed. I bought this from Frank. Most of my horses were bought from them. They had been loaning me money during all that time, they took chattel mortgages, that is, they had a chattel mortgage, sometimes they did not have one for a month or two months. In the last case they took a chattel mortgage for more than I owed them

at the time the mortgage was made. No, I don't think in other case, I ain't positive. My memory is good in somethings.

Q. Can you explain why, when you were first asked what Frank said, when they asked you to make this mortgage, you said you had forgotten, and then all that was said was they wished you to renew the old mortgage: can you explain why you
238 did not recollect anything more at that time? A. I did not remember at that time.

Q. Why didn't you remember? A. I was not thinking of it. That is the only explanation I can give. I told Mr. Frank in the month of April, 1902, before this last mortgage was made that Wanamaker and several other concerns owed me a little money.

Q. Didn't you try to get him to buy your claim against Wanamaker? A. No. This chattel mort-
239 gage did not mention claims against Wanamaker and other people who owed me money. My wife had some household goods. My wife bought them. She was not rich in her own right when I married her. She had no property of her own.

Q. How much was the household furniture worth? A. We had a few dollars when we came to this country a few years ago. She has some diamonds. I did not buy any diamonds for her. She bought some, yes, sir. I guess it was more than
240 two years before the failure.

Q. Didn't the money to pay for them come from you? A. No,. she always had some money, she had money before she was married. Her father is dead. He was in the wheelwright business in England. When she came here she had about one hundred and fifty pounds English money, somewhere around there. That is all she had. She bought the household goods out of that; some of them, some

of them were bought with my earnings, a few little things. I don't remember how much the diamonds cost. She still has them. I sold Mr. Frank some diamonds. I did not tell him they were my wife's, what he bought, he bought seven stones of me, seven or eight. I don't remember whether I showed him stones which I said were my wife's and I was trying to sell them in June, 1902. This conversation which I had with Mr. Frank in Mr. 242
Thompson's apartment house, was the night the sale was supposed to take place. On the Monday and in the evening Mr. Frank the same day, the sale was enjoined, it was one of them two days. Mr. Thompson walked away when I had the conversation with Frank. I could not say where. I don't know whether he could have heard, he might have heard it. Mr. Thompson was a customer of Frank, bought and sold horses of him. I don't recollect seeing Mr. Frank after the sale took place 243
and telling him that if he would give me a thousand dollars, I would leave the country and not testify in the bankruptcy proceedings. I did not tell him that if he gave me money to leave the country I would do so. I did not send my wife to see Mr. Frank; she went to see him. I did not tell her nothing; she did not go to see Mr. Frank while we were on the farm; she went while she was in the flat and I was at the farm. I didn't know anything about it. I did not make several attempts to get 244
Frank to give me money after the bankruptcy and never authorized my wife to do so.

RE-DIRECT-EXAMINATION by Mr. Hamilton:

This testimony that I gave in the United States Court—I gave that testimony when I was living on the farm with Mr. Thompson. Mr. Roake was

245 *Jacob Vogt.*

my lawyer that appeared for me down before the referee. Mr. Thompson got him for me.

Q. Who was your lawyer at the first hearing?

Objected to as irrelevant, immaterial and incompetent; objection overruled; defendants Frank except.

A. Mr. Thompson. I cannot remember now whether Sam Frank was there with me at that
246 time, at that first hearing. I seen him once before the referee when I was giving testimony.

Q. Was that the first or second hearing? A. It was the beginning of the hearings, and Thompson was there the lawyer. Mr. Frank went on my bail bond when I came down. I gave notes, I told the Court, for those moneys and the price of horses to Frank, I gave renewal notes to them to take the place of old ones. When I gave renewal notes I sometimes got back the old ones and sometimes I
247 did not. I kept an account of the notes I owed them, I had it on a slip of paper, every time I gave a note, I took a memorandum and wrote it on a slip of paper, at the time I gave the mortgage I thought it was between three and four thousand dollars. I mean to say that I kept some sort of an account, and that was the amount as nearly as I could make it out and when they were due, the dates.

Q. Look at this paper and state whether or not
248 it was an obligation which you gave to Wanamaker? A. Yes, sir.

Offered in evidence, Exhibit 2.

This was an indemnity bond to secure Wanamaker against certain liabilities including that in which judgment was subsequently entered against him. I knew about this suit that was brought against Wanamaker and which I defended. Rob-

ert Mazet and afterwards on appeal Mr. Thompson defended it for me.

Q. Look at this paper and state in whose hand writing it is in, if you know? A. It looks like that of Sam Frank. I have seen him write. I think that is his hand writing.

This paper is put in and marked for identification number 3.

250

J. F. YAWGER, witness, called on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Hamilton:

I am an attorney and counsellor at law, my office is at 115 Broadway. I have been a lawyer in New York State, since April, 1898. I am one of the counsel for the United States Guarantee Company, and I was in April and June last. I remember the occasion of this sale of horses and mules at the auction rooms, on the 3rd of July, 1902. The sale was actually held by the receiver on that day. I had an interview with the Franks before that day. The first interview I had with the Franks was on June 30th, 1902. On that day I filed a petition in bankruptcy against Jacob Vogt in the United States District Court for the Eastern District of New York at about ten o'clock in the forenoon and at about the same time presented to Judge Thomas an order which he signed appointing Arthur T. Stoutenbergh temporary receiver in bankruptcy, and restraining the auction sale which the Franks were about to hold at 11 o'clock on that day at the Fiss, Doerr & Carroll auction mart in Manhattan, and I obtained a certified copy of the restraining order, and the order appointing the re-

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ceiver, I went over to the auction mart of the Fiss, Doerr & Carroll Horse Company. I arrived there at 11 o'clock just as the first horse was being brought out to be sold. I served a certified copy of the restraining order upon Mr. Carroll who was holding the auction and also upon Mr. Samuel Frank whom I saw there at the same time. We then had a conference and Mr. Carroll said he
254 could not go on with the sale that he must obey the order of the Court and he telephoned to some one, he said to his attorney, asking what he should do; after making such inquiry, his attorney advised him he must obey the order of the Court, and that he could not hold the sale. Then Mr. Solon Frank arrived and the men gathered together in Mr. Carroll's office, there were Mr. Carroll, Mr. Samuel Frank, Mr. Solon Frank and myself, and someone representing Mr. Mullin who also appeared with
255 a restraining order at the same time. We had some conversation. That was on the 30th of June, 1902. The sale was postponed. There was an advertisement of that sale. This is a copy of it. It was advertised in the Herald. On that day I spoke with the Franks. Mr. Thompson came there with the Franks, saying he was the attorney, Mr. J. Campbell Thompson, I referred to, and that they had sent for him to talk with me about the matter. I had an interview with Thompson in the presence
256 of Frank. They introduced him to me as their attorney. Their attorneys they said were Maloney & Thompson, and this Mr. J. Campbell Thompson was Mr. Thompson of Maloney & Thompson. Mr. Stoutenburgh the temporary receiver was there with me on June 30, in Mr. Carroll's office, and Mr. Thompson and the Franks made a strong protest saying they were injured. I attended the sale on the 3rd of July, 1902. The sale occurred under the order attached to the complaint, the sale by the

temporary receiver in bankruptcy. It was advertised also in the New York Herald. This is a copy of the advertisement. I attended the sale on the 3rd of July, I was there all day. The Franks were there. I do not recall seeing Mr. Thompson there until after the sale had closed. Vogt was not there. At that time I had an interview with the Franks as to the amount of their claim, the consideration for the mortgage. Towards the close of 258
the sale, which commenced at eleven a. m., and closed between two and three p. m., towards the close of the sale I had a conversation there with both Samuel and Solon Frank asking them what they claimed was the consideration of the chattel mortgage; they said if I would call at their office which is across the street, on the south side of 24th Street after the sale, they would tell me; and they said their attorney Mr. Thompson would be there then, so I went to their office after the sale, that is 259
to say, between—somewhere about four p. m., I think it was, and they told me—

Mr. Foster: I object to any evidence of conversation between an attorney of one of the parties to this suit as necessarily confidential and incompetent.

(The witness continuing.) What they told me was entirely without reserve. I waited awhile in the office of the Franks, they told me their attorney, Mr. Thompson would be there presently, and 260
afterwards Mr. Thompson came and they first showed me, Mr. Samuel Frank in the presence of Mr. Solon Frank and also in the presence of Mr. Thompson, their attorney, said the consideration consisted entirely—

Objected to as a confidential conversation between the attorneys. Objection overruled; defendants Frank except.

They stated the consideration for the chattel mortgage which was given by the bankrupt Jacob Vogt on the 16th of April, 1902, consisted entirely of promissory notes and two protested checks. I asked them what checks they were, and they told me—showed me two checks which they said were the two checks referred to.

Objected to as before; objection over-
262 ruled; defendants Frank except.

They said they would show me what the notes were from their books, and in their office Mr. Samuel Frank sat down at a desk and took out an account book, turned over the pages, showing, pointing out entries of notes from page to page, and at the same time I asked him for a piece of paper, and he gave me a letter-head, and I took a memorandum of each note, as Mr. Samuel Frank read it off. I was standing behind him at the time, look-
263 ing over his shoulder and comparing the entries that I made with the entries in his book, until he got through.

By the Court: Q. Did he tell you how much the total was?

(The witness continuing.) Yes, after I had got through I added it up, and he said it was about correct, but there might be one or two notes that he had not found, and he said—I asked him then to look for them, he said he would have a full state-
264 ment made, he said he would make up the statement and send it to his attorney, Mr. Thompson would deliver it to me.

By Mr. Hamilton: Q. Is this paper we have here the paper you received from Mr. Thompson? A. Yes, Mr. Thompson told me he had received the paper from the Franks; I went to his office and he gave it to me.

Plff's Ex. 3—Statement of Unpaid Checks by Vogt to Franks.

Q. Is this the paper you got from the Franks? A. Yes, through Mr. Thompson; he said it had been sent to him pursuant to our arrangement—sent to him by S. L. and S. Frank.

The paper shown to the witness is the paper heretofore marked No. 3 for Identification, and is now offered in evidence. Received and marked Plaintiff's Exhibit No. 3.

Defendants Frank object. Objection overruled. Defendants Frank except.

Plaintiff's Exhibit No. 3.

S. L. & S. FRANK,

144 East 24th Street, near Lexington Avenue.
139 East 23rd Street, near Lexington Avenue.

Dated.		Due.	Amt.
	ck.	June 19	250
	"	June 21	505
May 1 1902 - 2	mo.	July 1	150
Sept. 14 1901 - 10	"	July 14	247.50
May 30 1902 - 2	"	July 30	300
June 1 1902 - 2	"	Aug. 1	115
" 14 1902 - 2	"	Aug. 14	225
" 18 1902 - 2	"	Aug. 18	160
May 13 1902 - 3	"	Aug. 13	400
June 13 1902 - 3	"	Sept. 13	300
Feb. 7 1902 - 6	"	Aug. 7	300
" 7 1902 - 7	"	Sept. 7	300
" 7 1902 - 8	"	Oct. 7	300
" 7 1902 - 9	"	Nov. 7	300
" 7 1902 - 10	"	Dec. 7	275
" 7 1902 - 11	"	Jan'y 7 - 1903	275
Mch. 1 1902 - 11	"	Feb. 1 1903	1900

This is the correct Amt. due us.

Plff's Ex. 3—Statement of Unpaid Checks by Vogt to Franks. 265

Q. Is this the paper you got from the Franks? A. Yes, through Mr. Thompson; he said it had been sent to him pursuant to our arrangement—sent to him by S. L. and S. Frank.

The paper shown to the witness is the paper heretofore marked No. 3 for Identification, and is now offered in evidence. Received and marked Plaintiff's Exhibit No. 3. 266

Defendants Frank object. Objection overruled. Defendants Frank except.

Plaintiff's Exhibit No. 3.

S. L. & S. FRANK,

144 East 24th Street, near Lexington Avenue.
139 East 23rd Street, near Lexington Avenue.

Dated.		Due.	Amt.
		ck. June 19	250
		" June 21	505
May 1	1902 - 2 mo.	July 1	150
Sept. 14	1901 - 10 "	July 14	247.50
May 30	1902 - 2 "	July 30	300
June 1	1902 - 2 "	Aug. 1	115
" 14	1902 - 2 "	Aug. 14	225
" 18	1902 - 2 "	Aug. 18	160
May 13	1902 - 3 "	Aug. 13	400
June 13	1902 - 3 "	Sept. 13	300
Feb. 7	1902 - 6 "	Aug. 7	300
" 7	1902 - 7 "	Sept. 7	300
" 7	1902 - 8 "	Oct. 7	300
" 7	1902 - 9 "	Nov. 7	300
" 7	1902 - 10 "	Dec. 7	275
" 7	1902 - 11 "	Jan'y 7 - 1903	275
Mch. 1	1902 - 11 "	Feb. 1 1903	1900

267

268

$6302.50

This is the correct Amt. due us.

269 *J. F. Yawger.*

A. According to the memorandum I made in Mr. Frank's presence that $6252.50 included the two checks you have now, one dated June 19th, 1902, for $505, and one dated June 21, 1902, for $250. Both those checks were dated after the date of the mortgage, one is dated June 19th, 1902, and the other is dated June 21, 1902. I have it also on my own memorandum that some of the notes Vogt
270 gave are dated after the mortgage, some, sometime before, and not one of the notes was given at the time the mortgage was given, nor any check. They were either before or after. I did not see the notes themselves. Mr. Frank said the notes themselves were in the bank. He said he did not have them, they were in the bank. I made that memorandum I hold in my hand at the time.

Paper is offered in evidence and marked Exhibit 4.

Plaintiff's Exhibit 4.

S. L. & S. FRANK,

Fast Road, Fine Coach and Business Horses,

FOR SALE AND EXCHANGE.

144 East 24th Street, near Lexington Avenue.
139 East 23rd Street, Near Lexington Avenue.

Cable Ajebarian. New York, July 3, 1902.

Prom. notes made by Jacob Vogt, payable to S. L. & S. Frank, at Bedford Bank, Bklyn.

Dated & Delivered		When due	Amts.
June 18/02	(For 2 horses)	Aug. 18/02	$160.00
" 14/02	Renewal	" 14/02	225.00
" 13/02	"	Sept. 13/02	300.00
May 13/02	"	Aug. 13/02	400.00
" 1/02	"	July 1/02	150.00
Mch. 1/02	"	Feb. 1/03	1900.00
Feb. 7/02	"	Dec. 7/02	275.00
" 7/02	"	Jan. 7/03	275.00
" 7/02	"	Aug. 7/02	300.00
" 7/02	"	Sept. 7/02	300.00
" 7/02	"	Oct. 7/02	300.00
" 7/02	"	Nov. 7/02	300.00
Sept. 14/01	"	July 14/02	247.50
June 19/02	unpaid checks		505.00
" 21/02			250.00
			$5887.50

Except the 2 checks which were shown to me, the above were read to me from S. L. & S. Frank's Bill Book.

J. F. Y. compared.

CROSS-EXAMINATION by Mr. Foster:

Nothing was said about settling this case before this information was given me. Mr. Thompson did not volunteer this information. I asked for it. I told him he claimed the chattel mortgage was valid, I asked what the consideration was in order to get the information so that I could form some opinion as to its validity. No suggestion on my
278 part or his part that the question might be settled. I think I may claim to be one of the counsel in this case. And I have taken part in the preparation of it from the beginning, more or less.

Mr. Hamilton offered in evidence the papers from the Bankruptcy Court. These papers proved the allegations in paragraph I, II, III, V, IX and X of the complaint.

279

LOUIS S. BARRETT, a witness called on behalf of the plaintiff, being sworn, testified as follows:

Direct-examination by Mr. Hamilton:

I am a horse shoer. I did horse shoeing for Vogt for a number of years.

Q. You know the amount of your claim against him for horse shoeing on the 16th of April, 1902? A. For $888. I have no judgment against him.
280 I did all of his shoeing. I had a running account and settlements occasionally. I rendered bills to him from time to time. I had no complete settlement with him more than at times I rendered him an account. From time to time I rendered bills. This is a bill I rendered to him along in December, 1902. That is the last. He did not say anything about it.

Objected to as incompetent and irrelevant.

The Court: A bill of December, 1902, I will not take that.

Q. Up to the first of March, 1902, what was the value of the horseshoeing you had done for him? A. I could not tell without looking at my books. I am quite sure I rendered bills monthly. A bill was rendered March 1, 1902 for the amount of 282
$1,070.

Q. Was the bill ever disputed?

Mr. Foster: We object. Vogt's admission to him that he owed that amount is not evidence against us. Objection overruled. Exception to defendants Frank.

A. No, sir, none of my bills ever have been disputed. It appears on this bill $300 was paid on it March 14, $200 and April 12, $100, that makes
$300. 283

Q. Those two payments were made prior to April 16? A. Yes.

Q. Without any criticism of the bill or any dispute that the amount of the bill rendered was not correct? A. No, sir, no dispute at all.

The amount of the bill is on April 16th, $888.

The Court: No it is $770.

Mr. Hamilton: According to this bill.

The Court: This bill contains charges for March and April. I will not make an 284
account of them. I do not think there is any evidence before me that the charges in this bill produced for April and March are correct.

Between March 1 and April 16, continual work was done every day. I could not tell to what extent without reference to my books. I was there and did part of the work myself. It was all done under my eye and under my observation.

285 By Mr. Hamilton: Q. What was the amount of that work that you did between the 1st of March and the 16th of April.

Objected to.

The Court: He says he saw it and has personal knowledge of it, if he did not do it himself, it was all done under his observation.

286 Objected to as incompetent. Defendants Frank except.

I have no memorandum to enable me to testify to the amount of work.

CROSS-EXAMINATION by Mr. Foster:

This paper I have brought into court is in my father's writing. I gave this to Mr. Vogt, at the date December, 1902, the date of the bill. I gave him previous bills. I am a practical horseshoer.

287 I work there every day, and keep tally of the work done. I copy that in two books. From that book copies were made in the ledger. I do a good deal of work there. I could not say how many thousand dollars. I figure up my work, I never got a contract to work that way. I shoe seven or eight hundred horses a month. It is impossible for me to state from recollection how many horses I shoe, that is what we keep the book for. I know the book to be correct from my personal observation.

288 I made entries in the tally book and copy them myself. All I know is the entries in the books are correct, and I copy those entries into my book after the work was done. I say the work was done because I did part of it. Because I know the book is correct. I have no personal recollection how many horses were shod for Mr. Vogt. All I know is the books were correct.

Mr. Foster: I move to strike out the testimony of this witness.

The Court: No, he testifies he rendered a bill; the first charge in this bill is the balance of the bill rendered on the 1st of March; I asked him if he rendered him a bill on the 1st of March for that amount and he said he did and it never has been criticised.

Q. By Mr. Foster. Did you send it to him by mail? A. No, I delivered it. 290

Mr. Foster: I move to strike out as before. I also move to strike out the testimony upon the ground that the actual bill rendered in March is the best evidence.

Motion denied. Defendants Frank except.

MARTIN HEFFERNAN, a witness called on 291 behalf of the plaintiff being sworn, testified as follows:

Direct-examination by Mr. Hamilton:

I live at 852 Atlantic Avenue. I am a stableman. In April, May and June, 1902, I worked for Vogt. I had charge of the horses. I had been working for Vogt two years and a half. I knew these horses pretty well. I have talked with you about this matter. I was there on the 16th of April. I did not leave there until the place was 292 closed up about the last of June.

Q. Will you tell how many new horses and mules were procured by Vogt between the 16th of April and the last of June?

Objected to as irrelevant, incompetent and immaterial. Objection overruled. Defendants Frank except.

293 *Martin Heffernan.*

A. I can remember about seventeen all told, that is all I can think of. That included the mules six mules. They came there after the 16th of April. All the six. That included all the horses I remember. I can remember only one coach horse. I have been thinking it over, and brought some of them to my memory. I made up a memorandum of the number. On the 28th or 27th of
294 June, all these horses went over to Carroll's on a Sunday. It must have been around eight o'clock they started. Mr. Joseph Lawrence came for them. The door was not locked. The sheriff was in charge. He came there Friday. I mean the marshal. When he came he found it locked, he knocked at the door, we asked who was there, that was Mr. Montgomery, Mr. Vogt's bookkeeper, he said it was the marshal, we opened the door and allowed him to come in. He asked for
295 the mules. He had one man and two men there working and the mules left the place. The mules were delivered to the marshal. And he took them away. He left a man in charge. Some deputy, I suppose. I was in and out, I lived next door, I was in and out all the time. The property went over to Carroll's as far as I know. I saw them afterwards. I attended the sale. I saw all these things sold that went over there. All with the exception of two mules, coaches, and four coach
296 horses and feed. The two new coach horses were not sold. Three traps, phaetons like. The horses that I said were bought after the 16th of April were sold with the exception of that one coach horse.

CROSS-EXAMINATION by Mr Foster:

I say there were seventeen horses bought in April. That is all I can remember to the best of my knowledge. I cannot tell you how many of those were bought from the Franks. I expected the marshal to come. The bookkeeper, Mr. Montgomery told me he was coming. He told me Mr. Frank was going to send the marshal over. I did not hear it from Vogt, I heard it over the 298 telephone. He made no objection to the marshal coming—not that I know of. The marshal was in charge when the horse blankets were wrapped up that they might be given to him. Two stablemen wrapped them up, Mr. Vogt's employees, not under my direction. I don't know who gave them the direction, I saw them doing it. I am now employed by Mr. Peter F. Reilly. I have not been employed by Mr. Vollkommer during the past year. 299

Mr. Hamilton: I want to show that none of the mortgages were ever filed in this County. If they concede that much, that is all I want.

Mr. Foster: I will concede, retaining my objection to relevancy of the evidence and as to immateriality, that no chattel mortgage from Vogt to Messrs. Frank was recorded in Brooklyn prior to the one described in the complaint. I object to admis- 300 sibility of the evidence as immaterial.

JACOB VOGT, re-called:

Cross-examination continued by Mr. Foster:

I spoke of certain conversations in regard to this chattel mortgage of 1902; I had all of them with Sam Frank. He was the one who negotiated with me with regard to the mortgage. Mr. Solon Frank did not.

Mr. Hamilton: All the debts amount to
302 $7,414, including Vollkommer and Gleischmann and Cardoni, the Cardoni matter is that Wanamaker case about which we have a docket. I suppose we could take the time to prove each one. The claims are for moneys retained which he had collected for Wanamaker, O'Neill and Daniels, and some are for goods sold.

The Court: Does not Mr. Vogt himself know?

303 Mr. Hamilton: I asked him about that he did not know definitely.

JACOB VOGT, re-called:

Re-direct-examination by Mr. Hamilton:

Q. Since the commencement of this action, at my request, have you made inquiry about the amount which you owed to different people when you gave this chattel mortgage?

304 Objected to. Objection overruled. Defendants Frank except.

A. Yes, sir. I have not looked up in my papers so that I know how much of their money I had retained up to the time this mortgage was made.

Mr. Hamilton: These moneys were intended to be deposited in the bank account.

The witness (Continuing). I have made inquiries, I know the amount I owed

to Fleischmann; he is one of my creditors. I owed him about $700 for feed on the 16th of April 1902. That feed was delivered to me and used in my stable. The account of Vollkommer was for horses, feed, harness. I bought feed, horses and mules of him.

Q. Do you know how much you bought of him and agreed to pay him, which you had not paid up to that time? 306

Objected to as incompetent. Objection overruled. Exception to defendants Frank.

A. From the 16th of April, I owed about $2,500 to Vollkommer for the matters I have referred to, after crediting all payments. I owed Barrett on the 16th of April several hundred dollars, I cannot tell exactly by ten or fifteen dollars. I delivered goods for John Wanamaker. I delivered pay goods and C. O. D. goods; in my C. O. D. goods my men collected money and turned 307 it over to the bookkeeper and I deposited it in the bank and we drew checks against it sometimes every two or three days. All those collections of C. O. D. goods were deposited in one bank. In the case of Wanamaker nothing was said about any agreement I might mix my moneys with his moneys. I remitted every day to Wanamaker. I don't remember to what extent I had made remittances to him. I don't remember to what extent I was in arrears. I 308 cannot approximate it within one hundred dollars. They had not sent me statements of arrears.

CROSS-EXAMINATION by Mr. Foster:

My men collected money for a good many people. I didn't collect it. They did not give it to me gave it to the bookkeeper. Some of the peo-

ple owed me money when this chattel mortgage was given. I don't think I had at that time taken any of the money and used it for myself. I had not used any of the money I collected from the customer and for my own purposes. I deposited all the money afterwards that is in the same bank. I deposited all my money in the same bank, it went to the bank to pay out to everybody, all my earn-
310 ings, what came in I put in the same bank. I had the same bank account for the money of my customers that I had for my own money. I don't think I ever did use the money of my customers for my own purposes, after the mortgage was given. After the mortgage I did not use it for my own purposes my own living. I could not tell, I had only one bank account, I don't know what I used it for. I had given no security to Vollkommer or Barrett.

311

WILLIAM H. WALDRON, called by plaintiff, being sworn, testified as follows:

Direct-examination by Mr. Hamilton:

I am a general bookkeeper of the Bedford Bank.

Q. Will you say what was the balance of Jacob Vogt in your bank on the 17th of April, 1902.

312 Objected to as irrelevant, incompetent and immaterial. Objection overruled. Defendants Frank except.

A. The balance was $36.40.

FRANK M. GORDON, called by the plaintiff, being sworn, testified as follows:

Direct-examination by Mr. Hamilton:

I am an attorney and counsellor at law. I was managing clerk for Robert Mazet at one time and associated with him. He was the attorney and I acted for him in the case of Cardino against John Wanamaker and others. I know about that suit. 314
I know Vogt here. He was one of the parties who consulted me with reference to it.

The Court: He agreed to pay whatever was recovered against the Wanamakers, how much was recovered against the Wanamakers?

Q. How much was collected?

Objected to by Mr. Foster as irrelevant, immaterial and incompetent. Objection overruled. Defendants Frank except.

A. The original judgment was for $665.33 and 315
the judgment on appeal for costs was $111.91. The original judgment was entered November 29, 1901. There was an appeal taken by me on behalf of Wanamaker. We were not attorneys of record at the time that judgment for costs on appeal was entered. Mr. Mazet was not the attorney of record. Thompson & Maloney were.

Mr. Hamilton: I offer in evidence the indemnity agreement dated October 5, 1899, and the two transcripts of judgment, first 316
the judgment and then that on appeal. I offer first in evidence the indemnity agreement.

Objected to as irrelevant by defendants Frank. Objection overruled. Exception.

317 *Plff's Ex. 2—Wanamaker Contract.*

Plaintiff's Exhibit 2.

JOHN WANAMAKER
Broadway—4th Ave.
9th & 10th Sts.

Philadelphia,
City Hall Square,
318 Paris,
5 Rue Rougemont.

New York, October 25, 1899.

For and in consideration of our having received payment from the firm of John Wanamaker for all deliveries of merchandise made by Vogt's Express from the 1st of July to the 13th of July, 1899, inclusive, we hereby pledge ourselves to reinburse the said firm of John Wanamaker for any judgment which may be obtained against them or
319 for any and all expenses incurred by reason of any suit brought against the said firm by Lewis F. Cardani as assignee of a claim made by Annie S. Chardavoyne for such services.

Witness,
Fred N. Hall.

Vogt's Bklyn & Sub. Del.
Robert W. Gibbons.
Jacob Vogt.

320 The plaintiff offered the transcript of judgment for $665.33, November 29, 1901.

Objected to by defendants Frank as irrelevant and immaterial. Objection overruled. Defendants Frank except. Marked in evidence Exhibit 6.

321

Exhibit 6.

AGAINST WHOM OBTAINED	IN WHOSE FAVOR
Wanamaker John Wanamaker Thomas B. Wanamaker L. Rodman Ogden Robert C.	Louis F. Cardani

322

Where Perfected	Transcript Filed	H. M.	When Perfected	H. M.	AMOUNT		Attorney	When Satisfied
						Damages and Costs		
City Court of New York	1901 Nov 29.	10.30 A	1901 Nov 20.	10.20 A		$665.83	Hone & Brown	May 8th, 1902

County Clerk's Office, }
County of New York, } ss:

323

I, Thos. L. Hamilton, Clerk of the County of New York, certify that I have compared the foregoing with the original entries in the above-entitled action, on the Docket of Judgments kept in this office, and that it is a correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 20th day of Sept., 1904.

THOS. L. HAMILTON.
Clerk.

325 *Frank M. Gordon.*

Mr. Hamilton: Can we call attention in the submission of the case to any papers in the bankruptcy proceedings, there are certain ones we especially want to use.

The Court: Yes, any that are competent. I will consider in evidence the whole bankruptcy record.

Mr. Hamilton: The petition and whatever is
326 necessary to give jurisdiction to the Court in the first instance; that is, the adjudication in bankruptcy, and the appointment of a receiver.

The Court: I will consider in evidence the whole bankruptcy record.

Mr. Foster: I wish to object to that. There are motions to punish Mr. Frank for contempt.

The Court: No, not collateral matters, they are immaterial.

Mr. Hamilton: I am willing to specify them.
327 The Court said that everything was considered in evidence and the other side did not object.

The Court: Any collateral and interlocutory orders as the one that has been referred to to punish some one for contempt is not material. Anything that is necessary to vest in the trustee in bankruptcy the rights of the bankrupt and of his creditors is material.

Mr. Foster asks the plaintiff to concede the receiver has not been discharged, and the plain-
328 tiff's counsel declines to do so. (S. M. 73 and 74.)

PLAINTIFF RESTS.

Mr. Foster: I move to dismiss the complaint on the following grounds: First, the evidence does not establish a cause of action; second, that the complaint, does not state a cause of action; third, that the evidence does not show any case for relief in equity; fourth, upon the ground that the complaint sets forth no case in equity; fifth, that

the plaintiff is entitled to a trial by jury, which he demands; sixth, that the court has no jurisdiction of the subject-matter of the action; seventh, that the receiver of the bankrupt is an indispensible party defendant, and he has been omitted; eight, upon the ground that the Trust Company in which the fund mentioned in the complaint was deposited is an indispensable party defendant to the action; ninth, that the parties who signed the stipulation 330 and the parties consenting to the order described in the complaint are all of them necessary parties to the action and that of them none of the petitioning creditors represented by Mr. Yawger and none of the petitioning creditors represented by Mr. Mullin are parties to this action; also upon each of the grounds stated in my motion to dismiss the complaint upon the opening.

Motion denied. Exception taken by defendants Frank. 331

Mr. Foster: I offer in evidence a chattel mortgage made by Jacob Vogt and H. Tyler (a certified copy) filed in the register's office of New York County, June 10, 1901, made to the Franks to secure the payment of two thousand dollars.

Marked in evidence Exhibit A.

Defendants' Exhibit A. 332

KNOW ALL MEN BY THESE PRESENTS.

That we, Jacob Vogt and E. H. Tyler, comprising the firm of Vogt and Tyler, of the City, County and State of New York, parties of the first part, for securing the payment of the indebtedness

333 *Defts'. Ex. A, Chattel Mge. of May, 1901.*

hereinafter mentioned, and in consideration of the sum of one dollar to us duly paid by S. L. and Samuel Frank of the same place parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant bargain and sell unto the said party of the second part, Twelve (12) horses
334 and all other goods and chattels mentioned in the schedule hereunto annexed, and now in the stable situated and known 542 West 43 St. (Five hundred and forty-two) New York City.

TO HAVE AND TO HOLD, all and singular, the goods and chattels above bargained and sold, or intended so to be, unto the said parties of the second part, their executors, administrators and assigns forever. AND we, Vogt and Tyler, the said parties of the first part, for ourselves, our
335 heirs, executors and administrators, all and singular of the said goods and chattels above bargained and sold unto the said parties of the second part, their heirs, executors, administrators and assigns, against us, Tyler and Vogt, the said parties of the first part, and against all and every person or persons whomsoever, shall and will warrant and forever defend. UPON CONDITION, that if we, Tyler and Vogt, the said parties of the first part, shall and do well and truly pay
336 unto the said parties of the second part, their executors, administrators or assigns, the true and lawful sum of Two thousand ($2,000.00) dollars payable as follows: One not of one hundred dollars payable May 15, 1901; two notes of one hundred and fifty dollars each one payable June 15th, 1901, and one July 15, 1900, the balance of said notes of two hundred dollars each payable on the fifteenth day of each and every month until the

whole sum of two thousand dollars is paid in full then these presents shall be void. AND we, Vogt and Tyler, the said parties of the first part, for ourselves, our heirs, executors, administrators and assigns, do covenant and agree, to and with the said parties of the second part, their executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, then it shall and may be lawful 338 for, and we the said parties of the first part, do hereby authorize and empower the said parties of the second part, their executors, administrators or assigns, with the aid and assistance of any person or persons to enter our dwelling house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain, and out of the 339 money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto us or to our heirs, executors, administrators or assigns.

AND until default be made in the payment of the said sum of money we to remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same. 340

IN WITNESS WHEREOF, we, the said parties of the first part, have hereunto set our hands and seals the sixteenth day of May, one thousand nine hundred and one.

TYLER & VOGT (L. S.)
by Jacob Vogt (L. S.)

Sealed and delivered
in the presence of
W. H. Woodhull.

341 *Defts'. Ex. A, Chattel Mge. of May, 1901.*

SCHEDULE REFERRED TO IN THE FOREGOING MORTGAGE:

Five (5) Bay Horses.
Two (2) Bay Mares.
Two (2) Brown Horses.
One (1) Brown Mare.
(2) Two Gray Horses.

342 TYLER & VOGT,
Jacob Vogt.

Dated, New York, May 16, 1901.
In the presence of W. H. Woodhull.

State of New York,
City of New York, } ss:
County of New York,

On the sixteenth day of May, in the year one
343 thousand nine hundred and one before me personally came Jacob Vogt of the firm of Tyler and Vogt to me known, and known to me to be the individual described in, and who executed the foregoing instrument and acknowledged that he executed the same.

W. H. WOODHULL,
(Seal) Notary Public No. 94,
N. Y. County (L. S.)

Discharged Apr. 7, 1902. John H. J. Ronner,—
344 Register.

REGISTER'S OFFICE,

COUNTY OF NEW YORK, STATE OF NEW YORK.

I, JOHN H. J. RONNER, Register of the said County, have compared the annexed copy with an instrument filed in this office, on the 10th day of

June, A. D. 1901, at 2 o'clock 50 min P. M. as Number 31977 of Chattel Mortgages, and certify the same to be a correct transcript therefrom, and of the whole of said instrument

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 12th day of June, 1903.

JOHN H. J. RONNER,

(Seal) Register. 346

Mr. Foster: I also offer in evidence a certified copy of a chattel mortgage filed August 7, 1901, in the Register's office of New York County, with a renewal notice dated August 7th, 1901, signed S. L. & S. Frank, said mortgage being made by Jacob Vogt to S. Frank, covering forty horses, thirty-four sets of harness and fourteen wagons 347 to secure the payment of $3,800.

Marked in evidence Exhibit B.

Defendants' Exhibit B.

KNOW ALL MEN BY THESE PRESENTS,

That I, Jacob Vogt, of the City of Brooklyn, 348 Kings County, State of New York, party of the first part, for securing the payment of the indebtedness hereinafter mentioned, and in consideration of the sum of one dollar to me duly paid by S. L. and S. Frank of the City, County and State of New York, parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged,

Defts'. Ex. B, Chattel Mge. of August 1900.

have bargained and sold, and by these presents do grant, bargain and sell unto the said parties of the second part, Forty Horses, 34 Sets of Harness, 14 Wagons and all other goods and chattels mentioned in the schedule hereunto annexed, and now in the stable situated and known as No. 850 Atlantic Avenue, City of Brooklyn, County of Kings, State of New York.

TO HAVE AND TO HOLD, all and singular, the goods and chattels above bargained and sold, or intended so to be, unto the said parties of the second part, their executors, administrators and assigns forever. AND I, Jacob Vogt, the said party of the first part, for myself and my heirs, executors and administrators, all and singular of the said goods and chattels above bargained and sold unto the said parties of the second part, their heirs, executors, administrators and assigns against me the said party of the first part and against all and every person or persons whomsoever, shall and will warrant and forever defend. UPON CONDITION, that if I Jacob Vogt, the said party of the first part, shall and do well and truly pay unto the said parties of the second part, their executors, administrators or assigns, the true and lawful sum of Thirty-eight Hundred (3800) Dollars payable on demand with legal rate of interest added thereon, then these presents shall be void. AND I Jacob Vogt, the said party of the first part, for myself, my heirs, executors, administrators and assigns, do covenant and agree, to and with the said party of the second part, their executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, then it shall and may be lawful for, and I the said party of the first part, do hereby authorize and empower the said parties

of the second part, their executors, administrators or assigns, with the aid and assistance of any person or persons, to enter my dwelling house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain, and out of the money arising therefrom, to retain and pay the 354
said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto me or to my heirs, executors, administrators or assigns.

AND until default be made in the payment of the said sum of money I to remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same.

IN WITNESS WHEREOF, I the said party of 355
the first part, have hereunto set my hand and seal the twenty-eighth day of August, one thousand nine hundred.

Signed,
JACOB VOGT (L. S.)

Sealed and delivered
in the presence of
W. H. Woodhull.

356

SCHEDULE REFERRED TO IN THE FOREGOING MORTGAGE.

(40) Forty Horses.
(17) Seventeen Sets Single Harness.
(17) Seventeen Sets Double Harness.
(14) Fourteen Single and Double Delivery

357 *Defts'. Ex. B, Chattel Mge. of August 1900.*

Wagons.

(7) Seven Covered Vans.

(1) One Flandrau Coach, Extension Top.

(1) One Trap.

G. & B. (1) One Top Buggy Wagon.

Signed

JACOB VOGT,

Dated, New York, August 28th, 1900.

358 In the presence of W. H. Woodhull.

State of New York,)
City of New York, } ss:
County of New York,)

On the 28th day of August in the year one thousand nine hundred (1900) before me personally came Jacob Vogt, to me known, and known to me to be the individual described in, and who executed the foregoing instrument and duly ac-
359 knowledged that he executed the same.

W. H. WOODHULL,
Notary Public (No. 94)
N. Y. County.

S. L. and S. Frank, the mortgagees within named, do certify and state that there remains due and unpaid on the mortgage, of which the foregoing is a true copy, Thirty-eight Hundred Dollars, and this copy and statement are filed to continue the notice required by the Statute made
360 and provided for the renewal of chattel mortgages.

Dated, this 7th day of August, 1901.

S. L. & S. FRANK,
By S. Frank.

REGISTER'S OFFICE.

County of New York, State of New York.

I, JOHN H. J. RONNER, Register of the said County, have compared the annexed copy with an

instrument filed in this office, on the 7th day of August, A. D. 1901 at 11 o'clock 39 mins A. M. as No. 42113 of Chattel Mortgages and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 12th day of June, 1903.

JOHN H. J. RONNER, 362

(Seal) Register.

Mr. Foster: I also offer in evidence a certified copy of the same mortgage with a certificate of the Register of its filing in New York County, August 30, 1900.

Marked Exhibit C.

Defendants' Exhibit C.

363

This was exactly similar to the chattel mortgage in Exhibit B with the following certificate.

REGISTER'S OFFICE,

COUNTY OF NEW YORK, STATE OF NEW YORK.

I, JOHN H. J. RONNER, Register of the said County, have compared the annexed copy with an instrument filed in this office, on the 30th day of August A. D. 1900 at 10 o'clock 14 mins A. M. as Number 45485 of Chattel Mortgages, and certify the same to be a correct transcript therefrom and the whole of said instrument. 364

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 11th day of June, 1903.

JOHN H. J. RONNER,

(Seal) Register.

J. M. B.

M. G.

365 *Samuel Frank.*

SAMUEL FRANK, a witness on behalf of the defendants Frank, being sworn, testified as follows:

I live at 128 East Sixtieth Street. My business is buying and selling horses. I am a member of the firm of S. L. & S. Frank, at 244 East 24th Street. I have known the defendant Vogt about four years. I have transacted business with him ever
366 since I have known him. I do not recollect exactly when it was. It was before 1900. The business I transacted with him was selling him horses and advancing money. I think we sold him the second horse, I think he had one horse when he came to us. He bought one from us. The first horse he owned died, he had no horse when he came to us, he had a wagon. And he started with that delivery wagon and one horse. After that I continued to sell him horses and ad-
367 vance money to him, I transacted business with him up to the 28th of June, 1902. I never saw those two complaints in the accident cases. I knew about the Wanamaker case. I never heard of these two suits for damages for negligence, before this trial. I had a conversation with Mr. Vogt before the chattel mortgage described in the complaint was made. At that time there was an outstanding chattel mortgage upon his property. It was all unpaid on the $3800, mortgage. There was
368 a great deal more indebtedness from him to me, arising from buying of horses and the advancement of money, amounting to I think sixty-five hundred and seven thousand. Mr. Vogt said that his business was improving, he was very busy, and he required more stock, we told him we would advance all he needed, and give him all the horses he required, and we did. He said all the horses he bought elsewhere would be included in our mort-

gage. We frequently advanced money to pay for stock he bought elsewhere anl also went security for horses he bought elsewhere. Vogt said to me that the different houses owed him about sixteen thousand dollars, he said, Wanamaker also owed him two month's bills. And the bills amounted to two to four thousand dollars a month, and if he had that money he would be able to pay us all off; he said, he had no other indebtedness, owed no 370
other sums of money except minor bills, shoe bills and feed bills, which were all contracted during the month and it was on the strength of those statements we advanced him whatever money he needed He said he was going to buy more horses, and that our mortgage was made to cover all the horses he would buy. He said that his business was good, and that he required more stock, and we said that we would give him whatever stock he wanted to help him out. and as much as he wanted and that 371
mortgage was made for that purpose. I thought eighty-five hundred dollars would be about his limit at the time the mortgage was given he owed us between $6500 and $7000, and it does not take long to buy $1500. He agreed that the mortgage should cover subsequent indebtedness. We never had any discussion on the point as regards selling any horses, covered by the chattel mortgage. He did not tell me he had sold any. He might have told me he had bought some after that mortgage was 372
made I knew he bought of Fiss, Doerr and Carroll. I could not exactly tell if he bought any from us, I should think about six or eight. Any horses we sold him were supposed to be covered. It was said anyway, he agreed any horses we bought—between ourselves. At that time he owed us between $6500 and $7000. That $3800 mortgage had not run out when the other mortgage was made. It was- still on in existence.

373 *Samuel Frank.*

Q. What was said between yourself and Vogt as regards the subsequent indebtedness, subsequent to the $3800, mortgage, when that mortgage was made? A. That was made in 1901.

Q. What was said at that time? A. I don't know, I don't remember.

Q. How much did you advance to Mr. Vogt on the strength of that chattel mortgage after it was
374 made?

Objected to on the grounds that it involves a conclusion, and the advances are by check or not, as appears.

The Court: You had better prove he made some advances, first.

I made advances on the chattel mortgage that was made, after April 16, 1902, by check. I sold him horses, how many horses I don't know, I have a memorandum. After April 16, fourteen horses.
375 The agreed price was $1680. I think if my addition is correct.

Q. How much cash if anything, did you advance to him at that time after the mortgage of April 16th, 1902?

Objected to on the ground that if the money was advanced by check, that the checks should be produced. A check is produced by the witness.

Q. How much was it? A. Five hundred dollars.
376 I advanced him on the security of the chattel mortgage after that, a thousand dollars, one on April 23, and one on May 25. I will produce the checks for it. He paid nothing on account. I claim $6302.52 is due yet. At the time the mortgage was made he owed me between $6500 and $7000, he paid something on account, but not on this. Some notes we had became due. He owed $6500 at that time, he must have paid after the mortgage was

made. Not after I advanced and sold to him. It was reduced from $6500 to $6200. Something on account of the existing debts. I never had any conversation with Vogt at any time in which I asked him to make this mortgage of April 16, 1902, or any mortgage for the purpose of covering his property so his judgment creditors could not obtain it. I never suggested to him in any way that he should make that mortgage for the purpose of 378
taking that property away from his creditors, no such thing in his mind or mine. The reason for making it was just for business reasons to cover different indebtedness. he expected to buy a great many horses, and it was to cover all this indebtedness to us. And the previous indebtedness exceeded $3800. by some thousand dollars, I had a conversation with Thompson. No suggestion or conversation from me to Vogt that he should say or state or agree to state a claim that these coach 379
horses that I had sold him, or any horses I sold him had been given to sell on commission, I had no reason to. I have not made that claim. I sold him some of those coach horses. I never advised him to misrepresent the facts to any one in any transaction. While he was on Mr. Thompson's farm he did on one occasion apply to me for money. It was sometime after, after my return from Europe and that was on the 7th of September, and between the 7th and the 10th we had a 380
meeting, we met in Sixth Avenue and he told me he needed money, and if he could get a thousand dollars he would get away and we win the case, he said he would leave the country. I told him all I wanted of him was to tell the truth. He applied to me.

Q. What did his wife say to you?

Objected to. Objection sustained, exception taken by defendants Frank.

381 *Samuel Frank.*

CROSS-EXAMINATION by Mr. Hamilton:

I have my notes here. I brought here all the notes I held against Vogt.

Q. That includes all of them? A. Yes, sir. They were all live running notes.

Q. Are they now?

By the Court: Q. Is there any note there, any part of which has subsequently been included in
382 another note? A. Lots of them, and notes that have been renewed and carried over. Here is a note that is not due, is that what you mean?

Q. No, is there any duplicated, is the date duplicated anywhere? A. No.

Q. Have you any notes on which you say he now owes you, which contains any sum of money contained in any other notes you have there? A. No, these are all— Each one is the representative of the indebtedness it covers. Some of these notes
383 renew former notes. They are all independent, there is no sum of money duplicated in two of those notes. He owes us I think $6302.50. Those two checks are included in the aggregate amount. They are not included in any notes I ho'd. They are not in addition to the amounts I have already given. They are not included in any of the notes. They were not paid on account of any note. There are not any notes that were paid. They were given on account of notes, but they were never
384 paid. This check was given in payment of a note. I have the note here. I have a note for that amount. It is not in this pile. I have taken that out and put the check in its place. I got that $200 note. That check for $250 is not in any of these notes, but in some other notes I have taken out of the bundle and put the check in place of it.

The bundle consisting of fifteen notes and two unpaid checks are offered in evidence as one exhibit and marked Exhibit 7.

Plaintiff's Exhibit 7.

These consisted of Notes signed by Jacob Vogt to Order of S. L. & S. Frank with dates mounts times and places of payment as follows.

Sept	14	1901	$ 250.00	payable	Nine Months	from	date	at	Bedford	Bank	of	Brooklyn.		
Sept	14	1901	247.50	"	Ten Months	"	"	"	"	"	"	"		
Feb	7	1902	300.00	"	Six Months	"	"	"	"	"	"	"		
Feb	7	1902	300.00	"	Seven Months	"	"	"	"	"	"	"		
Feb	7	1902	300.00	"	Eight Months	"	"	"	"	"	"	"		386
Feb	7	1902	300.00	"	Nine Months	"	"	"	"	"	"	"		
Feb	7	1902	275.00	"	Ten Months	"	"	"	"	"	"	"		
Feb	7	1902	275.00	"	Eleven Months	"	"	"	"	"	"	"		
March	1	1902	1900.00	"	Eleven Months	"	"	"	"	"	"	"		
May	1	1902	150.00	"	Two Months	"	"	"	"	"	"	"		
May	13	1902	400.00	"	Three Months	"	"	"	of	Brooklyn	Bedford	Bank		
May	30	1902	300.00	"	Two Months	"	"	"	Bedford	Bank	of	Brooklyn		
June	1	1902	115.00	"	Two Months	"	"	"	"	"	"	"		
June	13	1902	300.00	"	Three Months	"	"	"	"	"	"	"		
June	14	1902	225.00	"	Two Months	"	"	"	"	"	"	"		
June	18	1902	160.00	"	Two Months	"	"	"	"	"	"	"		
Amt			$6,302.50											387

Also included two unpaid checks to the order of S. L. & S. Frank signed by Jacob Vogt marked "Payment Stopped" as follows:

Check No. 25	June 21st 1902	Bedford Bank of Brooklyn	$250.00
Check No. 50	June 19th 1902	Bedford Bank of Brooklyn	$505.00

A. I have not my note book here. I have a note book. My note book shows all the transactions between me and Vogt with respect to the notes. I think I have a transcript of it. It is a very small book, you can have it here in the morning. I have here a check for $250, and I say that was given for a note of that amount. That check of June 21, 1902, was given to pay this note of September 14, 1901, due nine months after date. I remember the transaction of getting this check for this note. It was at my office. The check is dated a week ahead, and that had been his custom, he stopped payment on that note, you will find the note is marked "pay- 388

ment stopped." I don't know what it means. Vogt stopped payment on the note. This was payable at his bank, the Bedford Bank. I took the note from my bank and got this check in place of it. And the check itself was not paid. I have a note that represents that $505 check The notes for $500 is one of a series of notes, dated back to September, 1901; there was a series of those notes
390 amounting to about two thousand dollars. I have no notes in my possession for which renewal notes were given. Nothing that would have any bearing on this case that I know of.

Q. You cannot tell what that note of June 13 was given for; was it for money or for the purchase price of a horse? A. I could not tell you until I traced it up and see.

Q. Was it one or the other? A. I could not answer that without knowing. I am trying to
391 trace it up from my memorandum.

Q. There are several notes given dated considerably after the making of this mortgage, dated after April, 1902, what were they given for? A. For horses; they were paid after that date.

Q. One note for $1900, March 1, you testified to that? A. Those are renewals of other notes, other horses bought.

Q. What about the other note, March 1900. Was not that given to take up two notes for $1600,
392 and you required of Vogt to make out one note for $1900? A. No, nothing of the kind.

Q. Was not that note of $1900, a renewal note? A. And for the purpose of other horses. I could not tell you now what old notes went into that $1900 note, because I have to trace them things up. I could trace it up by my note book; my note book is not here.

Q. Have you got a copy of an account in your

book showing all the moneys Vogt paid you after April 16, 1902? A. Payments he made after April 16? No, I have not got that year; I don't know how much he paid me after that time. I don't believe it was a thousand dollars. I guess he paid more than a thousand dollars in the two months.

The Court: Q. He reduced the indebtedness? A. Yes, sir, but I do not know how much. I can get the accurate figures by referring to my note book. 394
The note book would show how much he paid. It would show the amounts he paid and when they were paid.

By Mr. Hamilton: Q. You don't know what old notes, two notes or more, went into this $1900 note, dated March 1, 1902, and due in eleven months which made the date February 1, 1903, for $1900; how did you come to arrive at that amount, $1900? A. In the first place I had a recollection that note was dated March 1, but it was drawn somewhere 395
between March 1 and March 8.

Q. How did you make up the items? A. He bought a horse for $275, on March 2, and one horse and also two horses in exchange March 4, difference 100, and also bought a bay horse on March $50.00, that amounts to $420,—that is, these horses purchased on March 2, 4 and 5.

Q. Then the $420, went into this $1900 note? A. I don't know, it had been made up possibly in that way. 396

Q. Can you tell me how those notes were made up, that is, what do they represent,—cash paid to him, or the value of the horses? A. There might, some I could and others I could not. If you point out the notes, I shall be able to tell you, that is, my hand writing on this statement, Exhibit 3. Thompson & Maloney were my attorneys. I and they inserted an advertisement in the Herald for the sale

of this property. I have just found out what that note was for, on June 13; it was in payment of three horses, that is a note of $300, dated June 13. It was for three horses purchased on that day. Those horses were sold at this auction two weeks later. I remember the horses.

Q. What other note here represents the purchase by him after the mortgage; I see you have
398 one of June 13? A. I guess you will find the note is dated June 18, two horses $250.

Q. On this statement it is the 16th? A. I may have made an error, that was the value of two horses. The $1900 item, as I remember it, was largely for renewal. I have not the old notes that went into the $1900 note; I always gave them back to Vogt, or I destroyed them.

Q. You have a lot there that he did not get back? A. They had no reference to these. They had
399 no reference to Vogt. He did not sign them.

Q. Vogt did not sign any of those old notes? A. I have shown you two. I have all the notes here that were signed by Vogt. The only two notes that I have here today are these two notes, one for $250, and one for $505, and they are represented by the two checks. I have not any of the old notes for which these new notes were made. I returned them to Mr. Vogt. I don't remember if I kept any of the old notes. I don't know about
400 it.

RE-DIRECT-EXAMINATION by Mr. Foster:

According to my best recollection I never kept any note after Mr. Vogt had paid it. I had no occasion to. I would not after the new note had been renewed by Mr. Vogt.

Q. Why is not your note book here? A. I came from Buffalo this morning, there was an accident

to our car which delayed our train an hour and twenty minutes and that prevented me from getting here in time, I arrived here at ten minutes past ten.

Q. Why didn't you send for the book? A. There is not anyone knows where it is, it is not in common use. I can produce it tomorrow or anything else we have in our possession. I can give you a better explanation when I glance over our note 402
book. I spoke to Mr. Vogt about foreclosing the mortgage. He said to me, about a week or ten days before this, he said business was bad, and he did not think he could go on any longer, I advised him to advertise, which he did, with no result, offered it for sale in New York, he was not successful in selling it; he said, the best thing we can do is to close the thing up. That was about June 21 or 22 I guess about then; I asked him when he thought he would be ready to stop, and he went 403
over to Fiss, Doerr & Carroll Horse Company Office and arranged the sale himself and Mr. Carroll. Mr. Vogt suggested to me to send over the marshall to take the horses after we came to that understanding.

Q. Did Mr. Vogt ever tell you before this chattel mortgage of 1902, was executed that he was running behind in his business? A. No, on the contrary he was telling me he was doing an awful big business. About the middle of March he wanted 404
me to buy a claim he had against Wanamaker for something like $7000. Prior to this mortgage, he claimed Wanamaker owed him for two months work, and he had received no settlement from him at all of that amount, six or seven thousand dollars that Wanamaker would pay to him for his services in delivering. That is according to his statement.

405 Q. What statement did Mr. Vogt make to you at the time this chattel mortgage of 1902 was made concerning the property covered by the former chattel mortgage? A. He simply told me he did not owe anybody but us, and he had sufficient money due from the concern to cover our indebtedness; and any horses he bought elsewhere, were to be covered by our chattel mortgage, and
406 for that reason we advanced him money, that he bought horses with elsewhere.

DEFENDANTS FRANK REST.

JACOB VOGT re-called by plaintiff:

Direct-examination by Mr. Hamilton:

It has been shown in evidence that I and Tyler
407 made a mortgage which covered certain property in Manhattan. I was in business with Tyler in New York, trucking business. That was not this same express business. It had nothing to do with this express business. I was then at that time in the express business. Separate and apart from this business. The horses were kept in 47th Street. None of the horses are mentioned in this chattel mortgage. The chattels covered by the Tyler mortgage was sold out about six months after-
408 wards. Six months after the Tyler mortgage was given. Mr. Tyler had charge of that business. I paid Frank the amount of that mortgage. That was all paid, a security by itself.

Q. Were any of these horses mentioned in any of these other mortgages, or any of the trucks or wagons ever kept over in New York County?

Objected to upon the ground that it embodies a conclusion, and the counsel should

refer to the specific mortgage and chattel.

The Court: I will take it. Exception to defendants Frank.

A. The horses I had in Brooklyn.

Q. Did you ever stable in New York, the horses in Brooklyn? A. Never in New York, I did stable in New York in partnership with Tyler. At the time I made the mortgage I lived in the same place, 852 Atlantic Avenue. I did not live in New York 410
County. The horses and trucks were not stabling there except the Tyler horses.

Q. It has been stated here that Mr. Frank sometime before this mortgage you went to him and told him that Wanamaker owed you $7000? A. I never told him anything like that, it was himself. I may have told him that I send my bill out once a month because I work a month before I can make a bill out and then I have to wait two or three weeks before I can get the money and that Mr. 411
Wanamaker's bill ran about $2,000 a month. I did not want cash. I told him I had so much money standing out. I suppose I told him when I borrowed the money of him. Sometimes I gave him a check, when I was short, for $500, and he gave me a check.

By Mr. Hamilton: Q. I am able to state now what some of the various notes were given for which are mentioned in this Exhibit 3. I have seen this list of notes. I know what they were giv- 412
en for. In a saloon in 22nd Street and Sixth Avenue. Mr. Frank told me Mr. Thompson wanted to see me. Mr. Thompson told me to go there and see Mr. Frank. That is when I was working on Thompson's farm. I went there.

Q. Did you go there? A. Yes, sir.

Mr. Foster moved to strike out what Thompson told the witness.

The Court: They have a right to show he did not go there of his own motion.

Defendants Frank except to the denial.

A. After I got there I saw Frank. Outside the saloon. I had a friend of mine with me. Mr. Mabie. We had a drink there was nothing said first off, while Mabie was present. Mr. Frank did not want to talk about anything, he went on the other cor-
414 ner, he called me over there. Mr. Mabie said "stay here, don't go over," I did not want to go first off, finally I went over there and he was trying to tell me how much he had done for me, he said "I put you on your feet, I helped you out;" I said, "I pay for it all, I pay you twice what I had made" that is all I said. I did not ask him on that occasion for seven hundred or two thousand dollars, the cost of my trip abroad, and I did not say I would leave the country. That was before I had
415 gone over to Vollkommer. When I had gone up in the country and was living with Mr. Thompson. I lived with Mr. Thompson long after that. Nothing was said that this mortgage for $8500 was to cover a large amount of stuff I was to buy later of Frank. Nothing was said on that subject. Or subsequent advances I was to get from him. He knew I had debts; I told him I was trying to sell the business. I told him the fact was I was not making any money I was losing money. I told
416 him I was losing a large part of the time twenty-five dollars a day. I guess I told him that about a month prior to the 28th of June. I told him before I gave the mortgage, I was not losing so much at that time.

CROSS-EXAMINATION by Mr. Foster:

Mr. Thompson was Mr. Frank's attorney and he was my attorney for about a year, in horse cases.

SAMUEL FRANK re-called:

Direct-examination by Mr. Foster:

Vogt never told me that he was losing money at the rate of twenty-five dollars a day before this chattel mortgage was made, if he had I never would have made the advances. He never told me that until about June 20th. I would not have advanced him any money after the date of that chat- 418
tel mortgage if I had not understood the chattel mortgage covered those advances.

The foregoing case on appeal contains all the evidence taken upon the trial of this action.

Stipulation.

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It is hereby stipulated and agreed that the foregoing printed case and exceptions on appeal be settled as the case and exceptions on appeal herein, on behalf of the defendant in this action, and that the said printed copy of said case and exceptions be ordered on file in lieu of engrossed copy thereof, and that the appeal herein be heard upon said printed papers.

Dated, New York, , 1904.

ROGER FOSTER, Atty. for Deft., 420
Frank Appellants.

FRANCIS B. MULLIN, Atty for Plff.-Resp.

The foregoing case is hereby settled and ordered on file.

Dated, New York, , 1904.

JOSIAH T. MAREAN, J. S. C.

421 *Waiver of Certification—Clerk's Certificate.*

Waiver of Certification.

It is hereby stipulated and agreed that the certification of the foregoing judgment roll, case and exception on appeal on the part of the defendant as required by the Code of Civil Procedure and the rules and practice of this Court
422 be and the same hereby is in all things waived, that the foregoing is a true copy of the judgment roll, notice of appeal and case and exceptions herein; and that the said appeal of the defendant be argued on the said printed papers.

Dated, New York, , 1904.

ROGER FOSTER, Atty. for Defts.,
Frank Appellants.

FRANCIS B. MULLIN, Atty for Plff.-Resp.

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Clerk's Certificate.

State of New York, Office of the Clerk of the County of New York, } ss:

I have compared the preceeding with the original case on appeal with notice, exceptions, etc.,
424 filed in this office on the day of , 1904, and do hereby certify the same to be a correct transcript therefrom and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal this day of , 1904.

Clerk of Kings County.

At a term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department at the Borough of Brooklyn, on the 6th day of October, 1905.

Present: Hon. Michael H. Hirschberg, Presiding Justice.
" " Willard Bartlett,
" " Almet F. Jenks,
" " Adelbert P. Rich,
" " Nathan L. Miller,
Justices.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy, etc., Respondent,
vs.
SOLON L. FRANK and SAMUEL FRANK, etc., Appellants.

Order of Affirmance on Appeal from Judgment.

The above named Solon L. Frank and Samuel Frank, the defendants in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 21st day of July, 1903, and the said appeal having been argued by Mr. Roger Foster of Counsel for the appellants, and by Mr. Francis B. Mullin of Counsel for the respondents, and due deliberation having been had thereon, and the Court having unanimously decided that the findings of fact are supported by the evidence,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and that the respondent recover of the appellants the costs of this appeal.

Enter,

M. H. HIRSCHBERG, *P. J.*

[Endorsed:] Supreme Court: Appellate Div. Second Judicial Dept. Joseph Vollkommer, Jr., etc., Plaintiff-Respondent, against Solon L. Frank and Samuel Frank, etc., Defendants-Appellants. Order of Affirmance on Appeal from Judgment. Francis B. Mullin, Attorney for Plaintiff, 44 Court Street, Brooklyn-New York. Rec'd Oct. 11, 1905. J. F. T.

Supreme Court, Kings County.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an Alleged Bankrupt, Plaintiff,
against
SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. Frank, Defendant.

Defendants Frank having appealed from the judgment herein to the Appellate Division of the Supreme Court, Second Judicial

Department and said judgment having been affirmed with costs; and the remittitur of the said Appellate Division, together with a certified copy of the order of affirmance, having been duly filed in this office, on the 11th October, 1905; and on the 21st October, 1905, plaintiff's costs on said appeal having been duly taxed at $149.50; it is now, on motion of Francis B. Mullin, plaintiff's attorney,

Ordered and adjudged that plaintiff recover of said defendants, Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, the sum of $149.50, and that said plaintiff have execution therefor.

Dated: October 23rd, 1905.

EDWARD KAUFMANN, *Clerk.*

O. K.
J. F.

[Endorsed:] Supreme Court: Kings County. Joseph Vollkommer, Jr., etc. against Solon L. Frank, etc. Judgment. Francis B. Mullin, Attorney for Plaintiff, 44 Court Street, Brooklyn-New York. (Copy.) R'c'd by mail Oct. 24/05. R. F.

UNITED STATES OF AMERICA,
State of New York, County of Kings, ss:

I, Charles T. Hartzheim, Clerk of the County of Kings of the State of New York, in whose office, in pursuance of Section 1355 of the Code of Civil Procedure, the record of the above case in the Appellate Division of the Supreme Court for the Second Department, was duly filed, and the original judgment of said Court was entered on or about the 23rd day of October, 1905, in virtue of the foregoing writ of error; and in obedience thereto, do hereby certify and return: that the following pages, numbered from 1 to 108 inclusive, contain a true and complete transcript of the record and proceedings in the said Appellate Division of the Supreme Court for the Second Department in the cause of Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, Plaintiff, Respondent, against Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank and Jacob Vogt, Defendants, Appellants, as the same remains on record and on file in my said office, the office of the Clerk of the County of Kings.

In witness whereof, I have caused the seal of my said office to be hereunto affixed on this 5th day of January, in the year of our Lord, one thousand nine hundred and six; and of the Independence of the United States one hundred and thirty.

[Seal Kings County.]

CHARLES T. HARTZHIEM, *Clk.*

Supreme Court, Appellate Division, Second Department.

October, 1905.
Present: Hirschberg, P. J.; Bartlett, Jenks, Rich and Miller, JJ.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Respondent,

v.

SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, Impleaded with JACOB VOGT, Appellants.

Appeal by the defendants Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the Clerk of the County of Kings on the 21st day of July, 1903.

Roger Foster for appellants; Francis B. Mullen (J. Frank Yawger with him on the brief) for respondent.

HIRSCHBERG, *P. J.*:

The judgment appealed from cancels and annuls a chattel mortgage given by the bankrupt to the appellants within four months of the filing of the petition in bankruptcy, on the ground that it was given with intent to hinder, delay and defraud creditors. The evidence is sufficient to support the judgment. Many interesting points are ably presented in behalf of the appellants, but I find none which necessitates a reversal.

The action was brought by the trustee in bankruptcy, and as tried was confined to an investigation of the validity of the chattel mortgage. It is to be regarded on this appeal as an action in equity only, and the appellants were not entitled to a jury trial. Such an action is the proper remedy for the destruction of the voidable lien (Houghton *v.* Stiner, 92 App. Div., 171). Prior to the commencement of the action an order was made in the United States District Court upon consent of all parties interested, providing for a sale of the mortgaged chattels, and the deposit of the purchase money with a trust company. The order further provided that such deposit should be made "as a special fund, there to await the further order of the court, upon due notice to all creditors who have or may hereafter appear. * * * and that the lien, if any, of the said alleged chattel mortgage of the said S. L. & S. Frank be transferred to and attached to said special fund or deposit in lieu of, and to the same extent that it attached to the said property hereinbefore directed to be sold." The order was made before the plaintiff's appointment as trustee, while the administration of the bankrupt estate was in charge of a temporary receiver.

The action is within the jurisdiction of the State court (Small *v.* Muller, 67 App. Div., 143). I do not think the possession of the fund by the Federal court deprives the State court of jurisdiction over the question of the validity of the chattel mortgage. The jurisdiction of the State court was originally exclusive, but is now concurrent with that of the Federal courts, and the plaintiff was accordingly at liberty to invoke either (Bankruptcy Act, 30 U. S. Stat. at Large, 562, sec. 67, subdiv. E). As a necessary incident to the cancellation of the chattel mortgage the judgment appealed from adjudges that the mortgage is not a lien upon the special fund, but there is nothing beyond that adjudication which in any way interferes with the disposition or control of the fund. The destruction of the lien would have followed the cancellation of the mortgage without a specific adjudication to that effect.

The trust company and the temporary receiver are not necessary parties to the litigation, and a complete determination of the controversy between the trustee and the appellants could be, and has been, had without their presence (Shanks *v.* Nat. Casket Co., 95 App. Div., 187).

The judgment should be affirmed.

All concur.

[Endorsed:] Supreme Court, Appellate Division, Second Department. Joseph Vollkommer, as Trustee in Bankruptcy, against S. L. & S. Frank, impleaded with Jacob Vogt. Opinion of Appellate Division.

In the Appellate Division of the Supreme Court for the Second Department.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Plaintiffs-Respondents,

against

SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, and JACOB VOGT, Defendants-Appellants.

SIR: Please take notice: That upon the affidavit of James A. Timony hereto annexed, sworn to October 14th, 1905; and upon the case on appeal, the printed record on appeal, the opinion of this Court, the order of affirmance entered herein on or about the 11th day of October, 1905; and upon all the papers and proceedings in the above entitled action, I shall move this Court at a stated term thereof to be held on Monday, the 13th day of November, 1905, at the opening of Court on that day, or as soon thereafter as counsel can be heard for an order allowing an appeal to the Court of Appeals; and for an order certifying to the Court of Appeals; that

one or more questions of law have arisen in this case, which in the opinion of this Court ought to be reviewed by the Court of Appeals, namely: (1) Whether the Supreme Court of the State of New York has jurisdiction of an action to set aside a chattel mortgage when the mortgaged property has been sold before the commencement of such action by a Receiver of the property of the mortgagor appointed by a District Court of th United States sitting in Bankruptcy; and the net proceeds of the same have been deposited, in accordance with an order of such Court of Bankruptcy in a Trust Company, there to await the further order of the Court upon due notice to all creditors, who have or may thereafter appear; (2) whether the Supreme Court of this State has jurisdiction to enter a judgment declaring that a chattel mortgage is no lien upon money deposited by a Receiver of a District Court of the United States sitting in Bankruptcy in a Trust Company, under an order of such District Court of the United States; (3) whether the Receiver appointed by the Court of Bankruptcy is not a necessary party to such an action, which is brought by the Trustee in Bankruptcy; (4) whether such Trust Company is not a necessary party to such an action; and for an order certifying all the questions of law in this case to such Court of Appeals; and for an order directing the Supreme Court sitting in and for the County of Kings to return the record of this cause to this Court; and for such other and further relief in the premises as may be just.

New York, October 14th, 1905.

Yours, &c.,

ROGER FOSTER,
Attorney for Defendants-Appellants,
35 Wall Street, New York.

To Francis B. Mullin, Esq., Attorney for Plaintiffs Respondents, 44 Court Street, Brooklyn, New York.

In the Appellate Division of the Supreme Court for the First Department.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Plaintiffs-Respondents,

against

SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, and JACOB VOGT, Defendants-Appellants.

CITY & COUNTY OF NEW YORK, *ss:*

James A. Timony, being duly sworn, deposes and says: I am a clerk in the office of Roger Foster, who is the attorney for the defendants appellants in the above entitled action; and I reside in the County of Kings. On or about the 6th day of October, 1905, this

Court handed down an opinion written by the Presiding Justice, which directed the affirmance of the judgment in the Court below in this action, after the case had been under consideration by the Court, since the 22nd day of March, 1905, when the appeal was argued.

On or about the 11th day of October, 1905, an order of affirmance was entered in the Clerk's office of this Court, no copy of which was received at the office of Mr. Foster until the 11th day of October, 1905. No copy of the opinion of this Court was received at this office until on or about the 10th October, 1905. Immediately upon the receipt of the opinion, Mr. Foster, as appears by the letter book in his office, sent a copy of the same to the defendants appellants, with a letter advising them to move for leave to appeal to the Court of Appeals. Mr. Foster did not receive instructions in the matter until October 13th, 1905, when he received a telephone message from one of the defendants, instructing him to make such application, and assigning as a reason for delay; that the said defendant had been out of town. These motion papers were immediately prepared.

The record in the case on appeal herein presents the questions stated in the notice of motion hereto annexed. Said questions are in my opinion, and in the opinion of the attorney for said defendants appellants novel and of sufficient importance to justify their review by the Court of last resort in this State.

JAMES A. TIMONY.

Sworn to before me this 14th day of October, 1905.

WILLIAM W. BROSS,
Commissioner of Deeds for City of New York.

[Seal of William W. Bross, Commissioner of Deeds City of N. Y.]

[Endorsed:] In the Appellate Division of the Supreme Court, for the First Department. Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, Plaintiffs Respondents, against Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank and Jacob Vogt, Defendants Appellants. Original. Notice of Motion and Affidavit. Roger Foster, Defendants Appellants' attorney, 35 Wall Street, New York. Served. J. A. T. Due and timely service of a copy of the within is admitted this 14th day of Oct., 1905. F. B Mullin, Pl'ff's Att'y.

At a Term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 17th day of November, 1905.

Present: Hon. Michael H. Hirschberg, Presiding Justice.
" " Willard Bartlett,
" " John Woodward,
" " Almet F. Jenks,
" " Aldelbert R. Rich, } Justices.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Plaintiff-Respondent,
against
SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, Defendants-Appellants.

Order.

Defendants having applied for leave to appeal to the Court of Appeals, from the judgment of affirmance rendered by this Court on or about the 6th day of October, 1905 said motion coming duly on to be heard; Roger Foster, Esq., said defendants' attorney, appearing and having been heard in support of the motion, and Francis B. Mullin, plaintiff's Attorney, appearing and having been heard in opposition thereto; and due deliberation having been thereupon had; it is now, upon reading and filing the notice of motion and annexed affidavit of James A. Timony, on plaintiff's motion hereby

Ordered that the said motion be, and the same hereby is in all respects denied.

Enter,

M. H. HIRSCHBERG, *P. J.*

[Endorsed:] Supreme Court: Appellate Div. Second Judicial Department. Joseph Vollkommer, Jr., as Trustee, etc., Plaintiff-Respondent, against Solon L. Frank and Samuel Frank, etc., Defendants-Appellants. Order. Francis B. Mullin, Attorney for Plaintiff, 44 Court Street, Brooklyn-New York. Rec'd. J. A. T. Dec. 28, 1905.

UNITED STATES OF AMERICA,
State of New York, County of Kings, ss:

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court of the State of New York for the Second Department in whose office the record of the foregoing case in the said Court was duly filed, in virtue of the foregoing writ of error, and in obedience thereto, do hereby certify and return: That the following pages numbered from 1 to 114 inclusive, contain a true and complete transcript of the record and proceedings in the said Appellate Division of the Supreme Court for the Second Department in the case of Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate

of Jacob Vogt, a bankrupt, plaintiff, respondent, against Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, who were impleaded with Jacob Vogt, as the same were filed in my said office.

In witness whereof, I have caused the seal of my said office to be hereunto affixed on this 13th day of January in the year of our Lord one thousand nine hundred and six; and of the independence of the United States one hundred and thirty.

[Seal Supreme Court, Appellate Division, Second Department.]

JOHN B. BYRNE, *Clerk.*

UNITED STATES OF AMERICA,
State of New York, County of Kings, ss:

I, Michael H. Hirschberg, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the Second Department, do hereby certify: That the original judgment of this Court in the above entitled action was duly filed in the office of the Clerk of the County of Kings in accordance with Section 1355 of the Code of Civil Procedure after the same had been previously duly filed in the office of the Clerk of the said Appellate Division of the Supreme Court of the State of New York for the Second Department; that the papers and proceedings in said action subsequent to said judgment were duly filed in the office of the Clerk of the said Appellate Division of the Supreme Court of the State of New York for the Second Department, and there remained; that the transcript of the record as certified by the said County Clerk of the County of Kings, and by the said Clerk of the said Appellate Division is a true copy of the record in this Court. I further certify that the seal annexed to the transcript herein signed by the Clerk of said Appellate Division is the seal of the Appellate Division of the Supreme Court of the State of New York for the Second Department; and that the signature thereto attached is the signature of the Clerk of said Court; and that the seal annexed to the transcript signed by the Clerk of the County of Kings is the seal of said Clerk. I further certify that on the argument of the appeal in said action, the appellants argued and insisted that the Supreme Court of the State of New York had no jurisdiction of this action because they claimed that the said action affected the title to a fund in the possession of the District Court of the United States and that said appellants further argued and insisted that the plaintiff, who is a Trustee in Bankruptcy, had no power to sue to set aside said chattel mortgage.

In witness whereof, I have hereunto set my hand and the seal of this Court this 16th day of January in the year of our Lord one

thousand nine hundred and six; and of the Independence of the United States of America one hundred and thirty.

[Seal Supreme Court, Appellate Division, Second Department.]

M. H. HIRSCHBERG,
Presiding Justice.

In the Court of Appeals.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an Alleged Bankrupt,
against
SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. Frank, and JACOB VOGT.

DEAR SIR: Please take notice: That upon the affidavit of James A. Timony hereto annexed, sworn to November 21st, 1905, upon the printed papers and case on appeal to the Appellate Division in the above entitled cause, upon the opinion of said Appellate Division, upon the briefs of counsel, upon the order of affirmance by said Appellate Division, and the judgment thereupon entered, upon the motion papers before the Appellate Division for leave to appeal to the Court of Appeals, and upon all the papers and proceedings herein: I shall move before the Honorable Edward T. Bartlett, a Judge of the Court of Appeals at his private chambers in the Ten Eyck Hotel, or at the Capitol or wherever he may be found, in the City of Albany on Monday, December 4th, 1905, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard for an order granting leave to the appellants to appeal to the Court of Appeals; and for such other and further relief in the premises as may be just.

Please take further notice: That the day for said hearing has been appointed by Judge Bartlett after he had been requested by the Attorney for the Appellants to appoint an earlier time convenient to the engagements of counsel.

Dated New York, November 22nd, 1905.

Yours &c.,
ROGER FOSTER,
Attorney for Defendants Franks, Appellants.

To Francis B. Mullin, Esq., Attorney for Plaintiff *Appellant*, 44 Court Street, Brooklyn, New York.

In the Court of Appeals.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an Alleged Bankrupt,
against
SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. Frank, and JACOB VOGT.

COUNTY OF NEW YORK, *ss:*

James A. Timony, being duly sworn, deposes and says: I reside in the County of Kings, and I am managing clerk in the office of Roger Foster, attorney for *plaintiffs* appellants. An order of the Appellate Division of the Supreme Court for the Second Department was made and entered in the above entitled suit on or about October 11th, 1905; which order affirmed a judgment entered below declaring a certain chattel mortgage to be void; and further declaring that said chattel mortgage was no lien upon certain moneys deposited in the District Court of the United States for the Eastern District of New York. A motion for leave to appeal to the Court of Appeals was duly noticed and argued by counsel for both sides before said Appellate Division on October 13th, 1905. On October 6th, 1905, a decision was handed down by said Appellate Division denying said motion for leave to go to the said Court of Appeals.

"JAMES A. TIMONY."

Sworn to before me this 21st day of November, 1905.

____ ____,
Notary Public, N. Y. Co.

[Endorsed:] In the Court of Appeals. Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an alleged bankrupt, against Solon L. Frank and Samuel Frank doing business as S. L. & S. Frank and Jacob Vogt. Original. Affidavit and Notice of Motion. Roger Foster, Defendants' Attorney, 35 Wall Street, New York. Motion to appeal to Court of Appeals denied. Edward T. Bartlett, Asso. Judge Court of Appeals. Dec. 7, '05. Due and timely service of a copy of the within affidavit & notice of motion is admitted this 22nd day of November, 1905. Francis B. Mullin, Plaintiff's Atty.

Supreme Court, County of New York.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt,
against
SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, and JACOB VOGT.

DEAR SIR: Please take notice that Messrs. Solon L. Frank and Samuel Frank are about to apply to a Justice of the Supreme Court of the United States for a writ of error to review the order and judgment of the Appellate Division, which affirmed the judgment of the Special Term herein; and that they hereby demand and request and notify you to join in the application for such writ of error.

Dated New York, December 12th, 1905.

Yours, &c.,

SOLON L. AND SAMUEL FRANK,
By ROGER FOSTER, *Their Attorney.*

To Jacob Vogt.

[Endorsed:] Supreme Court, County of New York. Joseph Vollkommer Jr. as Trustee against Solon L. Frank and Samuel Frank. Copy. Notice.

In the Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. Frank, Plaintiffs in Error,
against
JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an Alleged Bankrupt, and JACOB VOGT, Defendants in Error.

STATE OF NEW YORK, *County of New York, ss:*

James A. Timony being duly sworn, deposes and says: I reside in the County of Kings and State of New York; and I am above the age of 21 years. I am clerk in the office of Roger Foster, Esq., counsel and attorney for the plaintiffs in error herein. On December 12th, 1905, I made diligent search in the Borough of Brooklyn, City of New York and County of Kings for the above named defendant, Jacob Vogt, who resides in said Borough and County, but I could not find his place of residence. I inquired on that day at the sales stables of Vollkommer & Company, No. 25 Johnson Avenue, in the Borough of Brooklyn, City of New York and County

of Kings for said Jacob Vogt, who was formerly in their employ. I was informed by the person in charge of the said stable that the said Vogt was not then working for them; but that he called there frequently, and received letters and messages left for him there. On December 13th, 1905, I duly mailed in a post paid sealed envelope, deposited in the general post office in the Borough of Manhattan City, County and State of New York, a copy of the notice hereto annexed, addressed to said Jacob Vogt, c/o said Vollkommer & Company, No. 25 Johnson Avenue, Brooklyn, New York. The envelope thus mailed containing said notice, contained on the outside thereof, the name of said Roger Foster with his address, 35 Wall Street, New York. Neither said envelope nor said notice has been returned; and in my opinion, the same has been duly received by said Vogt. Said Vogt has not answered said letter and notice.

JAMES A. TIMONY.

Sworn to before me this 5th day of December, 1905.

[Seal of B. R. Higgins, Notary Public, City and County of New York.]

B. R. HIGGINS,
Notary Public, N. Y. Co.

[Endorsed:] In the Supreme Court of the United States. Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, Plaintiffs in Error, against Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, an alleged bankrupt, and Jacob Vogt, Defendants in Error. Notice to Jacob Vogt and Affidavit of Service. Roger Foster, Atty. for Plaintiffs in Error, 35 Wall Street, New York.

To the Honorable Melville Weston Fuller, Chief Justice of the United States; and to the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States; and to the other Justices of said Honorable Court; and to the Honorable the Supreme Court of the United States:

The petition of Solon L. Frank and Samuel Frank, who reside in the City, County and State of New York, respectfully shows:

I. Heretofore and on or about the 20th day of December, 1902, an action was commenced in the Supreme Court of the State of New York for the County of Kings by Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the estate of Jacob Vogt, Bankrupt, Plaintiff against your petitioners Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank and one Jacob Vogt as defendants. The complaint in said action alleged: That on or about July 10th, 1902, said Jacob Vogt was duly adjudged an involuntary bankrupt in the United States District Court for the Eastern District of New York; that on November 12th, 1902, plaintiff was

duly appointed trustee in bankruptcy of said bankrupt; and that he duly qualified as such on November 21st, 1902; that on April 16th, 1902, said Vogt delivered to your petitioners, the defendants Frank, a certain chattel mortgage on certain of the goods and chattels owned by said Vogt, to secure the payment of the sum of $8,500; that at the time of making said alleged mortgage, said Vogt was insolvent; that said mortgage was intended to create an unlawful preference; that said mortgage was void for usury; and that said mortgage was fraudulent for the reason that it was made for an amount greatly in excess of the indebtedness owing from said Vogt to said Franks; and was intended to injure the other creditors of said Vogt. Said complaint further alleged that on June 30th, 1902, one Arthur T. Stoutenberg was appointed by the Judge of the said United States District Court, Receiver of the property of said bankrupt; that by agreement between said Franks and the petitioning creditors of said Vogt in bankruptcy, an order was made, a copy of which order was annexed to said complaint, which order directed as follows: "It is ordered, that the said Temporary Receiver "be and he hereby is authorized and directed to sell at public auction "on Thursday, July 3rd, at 11 A. M., in the forenoon of that "day, at the Auction-Mart of the Fiss, Doerr & Carroll's Horse "Company, on the north side of 24th Street, between Third and "Lexington Avenues in the Borough of Manhattan, City of New "York, and on such other and further days as the Receiver may "designate, notice of the time and place of this sale to be published "on the 3rd day of July, in the New York Herald, a newspaper "published in the County of New York, the entire plant known "as Jacob Vogt's Surburban Delivery, consisting of the personal "property before described, belonging to the said alleged bank-"rupt, free from any and all liens of any kind and nature thereon, "and it is further ordered, that the expenses of said sale be de-"ducted from the moneys derived therefrom and it is further "ordered, that said Temporary Receiver be and he hereby is author-"ized and directed, within five days from the date of said sale to "deposit in the People's Trust Company of Brooklyn, as a special "fund, there to await the further order of the Court, upon due "notice to all creditors who have or may hereafter appear, the pro-"ceeds resulting from the sale of said property, after the deduction "of the expenses of said sale, and that the lien, if any, of the said "alleged chattel mortgage of the said S. L. & S. Frank, be trans-"ferred to and attached to said special fund or deposit in lieu "of, and to the same extent that it attached to the said property "hereinbefore directed to be sold. It is further ordered, that the "Temporary Receiver be and he hereby is authorized and directed "to deposit the balance of the proceeds of said sale as part of the "general fund of the estate of the alleged bankrupt." Said order was entered by the consent of the attorneys for the petitioning

creditors and for the attorneys of your petitioners. Said sale took place and the net proceeds thereof were duly deposited in said Trust Company in pursuance of said order subject to the further order of said District Court of the United States.

Said complaint prayed that the said chattel mortgage be declared null and void and be cancelled; and that the said fund, which was deposited as aforesaid under the order of said District Court of the United States in bankruptcy be declared free of the lien or incumbrance of said chattel mortgage, and free from any lien or claim by your petitioners under said mortgage or otherwise.

II. Your petitioners duly answered said complaint. The said bankrupt made a default. Subsequently, the issues raised by said pleadings came on for trial on June 16th, 1903 before Mr. Justice Marean of said Supreme Court of the State of New York at a Special Term thereof, held in the County of Kings. Upon said trial, your petitioners moved to dismiss the complaint in said action for several reasons amongst other reasons, specifying the following: That the said Supreme Court of the State of New York had no jurisdiction because said suit was brought to determine the title to property in the possession of said District Court of the United States. Said motion to dismiss was denied and your petitioners duly excepted to the denial of said motion. Subsequently, judgment was entered in said action, which judgment provided as follows: "It is ordered, "adjudged and decreed that the chattel mortgage executed and "delivered by Jacob Vogt of the Borough of Brooklyn, County of "Kings, to the above named defendants Solon L. Frank and Samuel "Frank of the City and State of New York, April 16th, 1902, to "secure the sum of $8,500 with legal interest and filed in the Office "of the Register of the County of Kings, April 18th, 1902, as "No. 11,230, be, and the same hereby is annulled and declared "void and of no effect. That said Register upon receiving a "certified copy of this judgment cancel the said chattel mortgage "of record and that the said chattel mortgage be and the same is "hereby adjudged and declared to be no lien upon the moneys, "viz. $5,481.47 deposited on July 9th, 1902, by Arthur T. Stouten-"burgh in the Peoples' Trust Company of Brooklyn, N. Y., under "an order of the District Court of the United States for the Eastern "District of New York, made July 2nd, 1902."

III. Thereupon, your petitioners duly excepted to said judgment and to the decision upon which the same was rendered and they duly appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York for the Second Department. Said appeal duly came on for argument before said Appellate Division and your petitioners through their counsel duly argued that said judgment should be reversed, and that said complaint should be dismissed for the reason that the District Court of the United States for the Eastern District of New York sitting in bankruptcy had the exclusive right to determine the title to said fund

deposited as aforesaid in pursuance to an order of said Court; and for the further reason that your petitioners had a contractual right under said order to have all questions concerning the right to said fund determined in said District Court of the United States sitting in bankruptcy; and your petitioners then in said Appellate Court and previously in said Court of first instance insisted that they had a title, right, privilege and immunity under the Constitution and Statutes of the United States, which relieved them from the jurisdiction of said State Court in said action; and which entitled them to have all questions concerning the title to said fund determined by the said District Court of the United States, sitting in bankruptcy.

IV. Thereafter on or about October 11th, 1905, an order was entered in the office of the Clerk of said Appellate Division, which order affirmed said judgment. On the same day, a certified copy of said order together with the original papers on said appeal was entered in the office of the Clerk of the County of Kings in the State of New York. Subsequently, on October 23rd, 1905, a judgment for the costs taxed upon said appeal was thereupon entered in the office of the Clerk of the County of Kings, which judgment directed as follows: "Ordered and Adjudged that plaintiff recover "of said defendants, Solon L. Frank and Samuel Frank, doing "business as S. L. & S. Frank, the sum of $149.50; and that said "plaintiff have execution therefor." Said decision of said Appellate Division was unanimous.

V. The constitution *on* laws of the State of New York provides as set forth in Section 191 of the Code of Civil Procedure, that no appeal shall be taken to the Court of Appeals of said State from a judgment of affirmance in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument as in fraud of the rights of creditors, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a Judge of the Court of Appeals. The decision of the Justice of said Supreme Court upon which said judgment was entered expressly stated as follows: "The grounds upon which the issues have been "decided are as follows: Said mortgage was made with the intent "and purpose of said Vogt and said defendants Frank to hinder, "defeat, defraud and delay said Vogt's creditors." Upon the trial of said action, no evidence of usury was offered; and the contention that said chattel mortgage was void under the bankruptcy law as a preference was not raised by the plaintiff, whose only contention upon the trial was that said chattel mortgage was void as a fraud upon the rights of the creditors of said Vogt. Subsequently to said order of affirmance by said Appellate Division, your petitioners duly applied to said Appellate Division and requested said Appellate Division to certify that in its opinion, a question of law was

involved in said case which ought to be reviewed by the Court of Appeals, and requested said Appellate Division to allow an appeal from said judgment to said Court of Appeals; but said Appellate Division refused to make such certification and refused to allow such appeal. Thereupon, your petitioners duly applied to the Honorable Edward T. Bartlett, a Judge of the Court of Appeals of said State and moved before him for the allowance of an appeal to said Court of Appeals from said Judgment; but on December 7th, 1905, the said Judge Bartlett denied said motion.

VI. Upon said trial and upon said appeal and upon said subsequent motions, which were made in said Appellate Division and before said Judge of the Court of Appeals, your petitioners duly argued and insisted and asked that said complaint should be dismissed upon the further ground that a trustee in bankruptcy could not maintain an action to set aside a chattel mortgage for fraud upon creditors in this case; in which there was no evidence that there were judgment creditors of said bankrupt represented by said trustee. Said objection made by your petitioners was overruled in all said Courts. Your petitioners duly excepted to said ruling in the trial Court. Your petitioners argued in said Appellate Division and before said Judge of said Court of Appeals, the question of the jurisdiction of said Court and of the said contractual right of your petitioners to have the questions decided by said District Court of the United States, which are hereinbefore set forth. Said decisions of said Courts and Judges, and of each of them denied to your petitioners, a title, right, privilege and immunity held by your petitioners under the constitution and statutes of the United States.

Wherefore your petitioners pray that a writ of error may issue and that they may be allowed to bring up for review before the Supreme Court of the United States, the said order and judgment of said Appellate Division of said Supreme Court of the State of New York; and that your petitioners may have such other and further relief in the premises as may be just; and your petitioners will ever pray, &c.

SOLON L. FRANK.
SAMUEL FRANK.
ROGER FOSTER,
Petitioners' Attorney, 35 Wall Street, New York.
ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK, *County of New York, ss:*

Solon L. Frank, being duly sworn, deposes and says: I am one of the foregoing petitioners. The foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn to before me this 9 day of December, 1905.

[Seal of Isidor Mehrbach, Notary Public, New York County.]

ISIDOR MEHRBACH,
Notary Public, N. Y. Co.

Read on application for writ of error Dec. 19, 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

[Endorsed:] Supreme Court of the United States. In the Matter of the Petition of Solon L. Frank and Samuel Frank, Plaintiffs-in-Error, against Joseph Vollkommer, as Trustee in Bankruptcy, Defendant-in-Error. Original. Petition for Writ of Error. Roger Foster, Petitioners' Attorney, 35 Wall Street, New York. Due and timely service of a copy of the within — is admitted this — day of ——, 190-.

Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. Frank, Plaintiffs in Error,
against
JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Defendant in Error.

And now come Solon L. Frank and Samuel Frank, Plaintiffs in Error, and make and file this their Assignment of Errors.

I. The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in refusing to direct a dismissal of the complaint in the action below for the reason that the Supreme Court of the State of New York had no jurisdiction of said case.

II. The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

III. The said Appellate Division erred in refusing to direct the dismissal of said complaint for the reason that the plaintiff below had no right to sue to set aside a chattel mortgage in a case where he did not represent a judgment creditor of the mortgagor.

IV. The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

V. The said Appellate Division for the Supreme Court of the State of New York erred in refusing to set aside so much of the judgment of said Supreme Court in the County of Kings as adjudicated concerning the title to a fund, which had been deposited

under an order of the District Court of the United States for the Eastern District of New York.

VI. The Supreme Court of the State of New York for the County of Kings erred in making such an adjudication.

VII. The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in affirming the judgment of the Supreme Court of the State of New York for the County of Kings hereinbefore referred to.

ROGER FOSTER,
Attorney for Plaintiffs in Error,
35 *Wall Street, New York.*

Read on application for writ of error Dec. 19, 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

[Endorsed:] Supreme Court of the United States. Solon L. Frank and Samuel Frank, doing business under the name of S. L. and S. Frank, Plaintiffs in Error, against Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, Defendant in Error. Original. Assignment of Errors. Roger Foster, Atty. for Plaintiffs in Error, 35 Wall Street, New York.

To the Honorable the Supreme Court of the United States:

SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. Frank, Plaintiffs in Error,

against

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, and JACOB VOGT, Defendants in Error.

And now come Solon L. Frank and Samuel Frank, the plaintiffs in error, and pray for a reversal of the judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department in the action brought by Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, plaintiff and respondent, against Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, defendants, appellants, who were impleaded with Jacob Vogt, who made default, which judgment was entered in the office of the Clerk of the County of Kings on or about the 23rd day of October, 1905; and they also pray for a reversal of the order of affirmance in said action by said Appellate Division, in the office of the Clerk of said Appellate Division on or about October 11th, 1905; and they also pray for a reversal of the judgment in said action, of the Supreme Court of the State of New York in and for the County of Kings,

entered in the office of the Clerk of the County of Kings on or about July 21st, 1903.

ROGER FOSTER,
Attorney for Solon L. Frank and Samuel Frank, 35 Wall Street, New York.

[Endorsed:] To the Honorable the Supreme Court of the United States. Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, Plaintiffs in Error, against Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, and Jacob Vogt, Defendants in Error. Original. Prayer for Reversal. Roger Foster, Atty. for Plaintiffs in Error, 35 Wall Street, New York.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Appellate Division of the Supreme Court of the State of New York for the Second Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Appellate Division of the Supreme Court of the State of New York for the Second Department, before you, or some of you, between Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt plaintiff and Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, defendants, impleaded with Jacob Vogt, a bankrupt, a manifest error has happened to the great damage of the said Solon L. Frank and Samuel Frank, as is said and appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in the District of Columbia within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of December, in the year of our Lord, one thousand nine hundred and five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by R. W. Peckham, Associate Justice of the Supreme Court of the United States, December 19, 1905.

R. W. PECKHAM.

[Endorsed:] Supreme Court of the United States. Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, Plaintiffs in Error, against Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, Defendant in Error. Original. Writ of Error. Roger Foster, Attorney for Plaintiffs in Error, 35 Wall Street, New York. Service of a copy of the within Writ of Error is admitted this 28th day of December, 1905. F. B. Mullin, Def't's Atty.

UNITED STATES OF AMERICA, *ss:*

To Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a bankrupt, and to Jacob Vogt, Greeting:

You are hereby cited and admonished — at a Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Appellate Division for the Supreme Court of the State of New York for the Second Department, wherein Solon L. Frank and Samuel Frank are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, Melville W. Fuller, Chief Justice of the United States, this 19th day of December, in the year of our Lord, one thousand nine hundred and five.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, Plaintiffs in Error, against Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacog Vogt, a bankrupt, Defendant in Error. Original. Citation of Error. Roger Foster, Atty. for Plaintiffs in Error, 35 Wall Street, New York. Copy rec'd, 28 Dec., '05. F. B. Mullin, Def't's Atty. Vogt & Vollkommer.

Know all men by these presents, that we, Solon L. Frank and Samuel Frank, transacting business as S. L. & S. Frank of the City, County and State of New York, as principals, and Henry Meise and Martin J. Potter, of the City, County and State of New York

as sureties are held and firmly bound unto Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt, in the full and just sum of $1,000, to be paid to the said Joseph Volkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, Bankrupt, his attorneys, executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our respective corporate seals and dated the 12th day of December in the year of our Lord, one thousand nine hundred and five.

Whereas, the said Solon L. Frank and Samuel Frank have applied for a writ of error to bring up to the Supreme Court of the United States for review, an order and judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department, entered in the office of the Clerk of the County of Kings during the month of October, 1905, and an order of said Appellate Division entered in the office of the said Clerk, and also entered in the office of the Clerk of said Appellate Division on or about October 11th, 1905, which order and judgment affirmed a judgment of the Special Term of said Supreme Court for the County of Kings, which, amongst other things, adjudged that a certain chattel mortgage executed by the said Vogt to the said plaintiffs-in-error was null and void; and that the same was no lien upon certain moneys deposited on July 9th, 1902 in the People's Trust Company of Brooklyn under an order of the District Court of the United States for the Eastern District of New York; Now, therefore, the condition of this obligation is such, that if the above named plaintiffs-in-error Solon L. Frank and Samuel Frank shall prosecute said writ of error to effect, and if he fail to make his plea good, shall answer all damages and costs; then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

"SOLON L. FRANK." [SEAL.]
"SAMUEL FRANK." [SEAL.]
"HENRY MEISE." [SEAL.]
"MARTIN J. POTTER." [SEAL.]

Approved by

——— ———.

STATE OF NEW YORK, *County of New York, ss:*

Solon L. Frank, being duly sworn, deposes and says: I am one of the sureties who have executed the foregoing bond. I am a freeholder in the City, County and State of New York in which I reside. I am worth the sum of more than $2,000 in addition to such prop-

erty as I hold exempt from execution and over and above all my debts and obligations.

Sworn to before me this 12th day of December, 1905.

[NOTARIAL SEAL.] "ISIDOR MEHRBACH,"
Notary Public, N. Y. Co.

STATE OF NEW YORK, *County of New York, ss:*

Samuel Frank, being duly sworn, deposes and says: I am one of the sureties who have executed the foregoing bond. I am a freeholder in the City, County and State of New York in which I reside. I am worth the sum of more than $2,000 in addition to such property as I hold exempt from execution and over and above all my debts and obligations.

Sworn to before me this 12th day of December, 1905.

[NOTARIAL SEAL.] "ISIDOR MEHRBACH,"
Notary Public, N. Y. Co.

CITY, COUNTY AND STATE OF NEW YORK:

I hereby certify that on this 12th day of December, 1905 before me personally appeared Solon L. Frank, Samuel Frank, Henry Meise and Martin J. Potter the persons named in the foregoing bond, and that they and each of them were known to me, and that they and each of them then acknowledged that they had freely and voluntarily executed the same.

[NOTARIAL SEAL.] "ISIDOR MEHRBACH,"
Notary Public, N. Y. Co.

[Endorsed:] Supreme Court of the United States. Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, Defendant in Error, against Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, and Jacob Vogt, Plaintiffs-in-Error. Copy. Supersedeas Bond. Roger Foster, Atty. for Plaintiffs-in-Error, 35 Wall Street, New York.

Endorsed on cover: File No. 20,051. New York supreme court. Term No. 184. Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, plaintiffs in error, *vs.* Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, a bankrupt, and Jacob Vogt. Filed January 17th, 1906. File No. 20,051.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 9 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 184.

SOLON L. FRANK AND SAMUEL FRANK, DOING BUSINESS UNDER THE NAME OF S. L. & S. FRANK,

Plaintiffs in error,

against

JOSEPH VOLLKOMMER, JR., AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JACOB VOGT, A BANKRUPT, AND JACOB VOGT,

Defendants in error.

BRIEF FOR PLAINTIFFS IN ERROR.

ROGER FOSTER,
Counsel for plaintiffs in error,
35 Wall Street,
New York.

[20,051]

FILE COPY

Supreme Court of the United States

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. FRANK, Plaintiffs in Error, AGAINST JOSEPH VOLLKOMMER, Jr., as Trustee in Bankruptcy of the Estate of JACOB VOGT, a bankrupt, and JACOB VOGT. Defendants in Error.	October Term, 1906. No. 184.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is a writ of error sued out by two of the defendants below, which brings up for review a judgment of the Supreme Court of the State of New York, which provides as follows:

"IT IS ORDERED, ADJUDGED AND DECREED, that the chattel mortgage executed and delivered by Jacob Vogt, of the Borough of Brooklyn, County of Kings, to the above named defendants Solon L. Frank and Samuel Frank, of the City and State of

New York, April 16, 1902, to secure the sum of $8,500, with legal interest, and filed in the office of the Register of the County of Kings April 18, 1902, as No. 11,230 be, and the same hereby is, annulled and declared void and of no effect. That said Register, upon receiving a certified copy of this judgment, cancel the said chattel mortgage of record, and that *the said chattel mortgage be and the same is hereby adjudged* and declared *to be no lien upon the moneys*, viz., $5,481.47, *deposited* on July 9, 1902, by Arthur T. Stoutenburgh *in the* People's *Trust Company* of Brooklyn, N. Y., *under an order of the District Court of the United States* for the Eastern District of New York, made July 2, 1902" (p. 26, fols. 101–103).

This judgment, which was entered at Special Term, was unanimously affirmed by the Appellate Division of that Court for the Second Department (pp. 107–108). Leave to appeal to the Court of Appeals from this judgment was denied by Judge Bartlett of that Court (p. 116).

The complaint prayed judgment: that a certain alleged chattel mortgage be declared null and void; "that the alleged indebtedness intended to be secured thereby be declared null and void;" and that a fund deposited in the People's Trust Company under an order of the District Court of the United States for the Eastern District of New York sitting in bankruptcy, which directed that the deposit there "await the further order of the Court" be declared free of the lien or incumbrance of that chattel mortgage and free from any lien or claim by the defendants Frank, the mortgagees thereunder, or otherwise (p. 8).

The original defendants were the chattel mortgagees, the plaintiffs in error, Messrs. Frank, and the bankrupt mortgagor, Jacob Vogt, who did not answer the complaint, and who has refused to join in the writ of error, although duly requested so to do (pp. 117, 118), and who has been served with a citation (p. 126).

The chattel mortgagees were horse dealers on Manhattan Island (p. 92, fol. 365). The bankrupt was an expressman in Brooklyn, employed by owners of department stores and dry goods houses to carry goods to the customers and collect for the same on delivery (p. 32, fol. 128). The mortgagees had for many years sold him horses on credit and loaned him money (p. 92, fol. 366). At the time the chattel mortgage in suit was given the Franks held a previous chattel mortgage upon the same property to secure the sum of $3,800 which was still unpaid, and he owed them other money amounting to about $7,000 (p. 92, fols. 367, 368). The sum of $500 in cash was advanced at the time the second mortgage was executed (p. 94, fol. 375). They also, later, sold him horses on credit, and lent him money to a considerable amount (p. 97, fols. 375, 376), under an agreement made at the time the mortgage was executed; that such advancements should be made and credits given, and that the mortgage should cover the subsequent indebtedness thus arising (p. 93, fols. 369–371; p. 95, fol. 378; p. 102, fol. 405).

It appeared by the complaint and uncontradicted evidence, that, before the filing of the petition in bankruptcy, the mortgagees took possession of the mortgaged property, which consisted of horses, harnesses and wagons, with the consent and at the request of the bankrupt.

The bankrupt testified: "I called them up on the "telephone and told them that the bonding com- "pany thought that I had better stop doing busi- "ness, and they said they would send some one over "to foreclose the mortgage and take the possession "of the horses and my stable here. I made no ob- "jection to their doing so. I told them that they "could do so. I told them that two or three days "before that" (p. 57; see p. 43). The bankrupt thereupon absconded and remained in hiding till he was found and arrested by the marshal (pp. 50, 51, fols. 199-201; p. 47, fol. 187; p. 53, fol. 212).

His foreman, however, whom he left in charge,

delivered the horses to the deputy marshal sent by the mortgagees; and the bankrupt's employees wrapped up the blankets and harness so that the marshal could take them away (Vogt, p. 47, fol. 185; p. 57, fol. 226). This was in pursuance of a clause in the chattel mortgage authorizing the mortgagees so to act (p. 10, fol. 38).

The Messrs. Frank thereupon duly advertised the property for sale. Some of Vogt's creditors filed a petition in bankruptcy and procured the appointment of a receiver and an injunction against the sale (Vogt, p. 48, fol. 190; Yawger, pp. 63, 64, fols. 250–255; Cplt., pp. 4–6, fols. 15–24).

To prevent the horses from eating their heads off, the mortgagees were forced to consent to an order authorizing the immediate sale, and providing that their right to the proceeds be determined by the United States Court in Bankruptcy. That order, a copy of which is annexed to the complaint, after ordering the sale, directed "And it is further "Ordered, that said Temporary Receiver be and he "hereby is authorized and directed, within five "days from the date of said sale, to deposit in the "Peoples' Trust Company of Brooklyn, as a special "fund, *there to await the further order of the Court*, "upon due notice to all creditors who have or may "hereafter appear, the proceeds resulting from the "sale of said property, after the deduction of the "expenses of said sale, and that the lien, if any, of "the said alleged chattel mortgage of the said S. L. "and S. Frank, be transferred to and attached to said "special fund or deposit in lieu of, and to the same "extent that it attached to the said property herein-"before directed to be sold" (p. 14, fols. 53–54).

These proceedings disposed of the chattel mortgage by a foreclosure of the same; and gave to the Federal Court, by the express contract of the parties, the determination of all questions as to the title to the proceeds.

The trustee in bankruptcy instituted the proceedings in that Court with a view to obtaining the

fund. For that purpose he examined the bankrupt before the Referee in Bankruptcy and attempted to prove by his testimony, that the mortgage was fraudulent. This examination took place on September 26, 1902, a few months after the execution of the chattel mortgage.

The bankrupt then testified as follows in answer to questions put to him by the trustee's counsel:

"Q. Who asked you to make the mortgage? A. "Frank.

"Q. What did they say when they asked you to "make it? A. *I have forgotten now.*

"Q. They merely asked you to make this mortgage "as a renewal; that is all? A. That is about all" (Vogt, p. 55, fol. 219; p. 60, fol. 237).

The trustee in bankruptcy was dissatisfied with this testimony. If he had continued the litigation in the Federal court the case would undoubtedly have been tried before the Referee who heard the evidence or else before a jury. In order to obviate this and to obtain a fresh tribunal not impressed by that evidence he began this suit in the State court in a county where he lived and the mortgagees did not. Thereupon the trustee, who is one of the bankrupt's creditors to the amount of about $2,500, took the bankrupt into his employ at a salary nearly double of what Vogt received before (Vogt, p. 53, fol. 209; p. 77, fol. 306; p. 54, fol. 214).

Before he entered the plaintiff's employ Vogt told Mr. Samuel Frank that if he could get a thousand dollars he would get away and the Franks "win the case, he said he would leave the country." Mr. Frank refused to give him this (p. 95, fol. 380).

The plaintiffs in error offered to prove similar demands for money made by Vogt's wife, but the testimony was excluded under their objection (*Ibid.*).

The trustee and his counsel immediately discussed the case with the bankrupt (p. 54, fol. 214). The result of this employment and the other argu-

ments used at that discussion was a refreshment of the bankrupt's memory and a complete change of his testimony when called on the trial below while he was still in the trustee's employ. He then testified, prompted by leading questions, that about a week or ten days before the chattel mortgage was made he told Mr. Samuel Frank that he had been sued by three men for $20,000 damages for *bruises* only, there being no claim of sprains or broken bones, nor even of loss of blood.
alleged to have been caused by the negligence of his drivers (p. 34, fols. 134–135; pp. 36–40, fols. 143–160). Neither of these suits has ever been tried, nor has any claim upon them been proved in bankruptcy. He said, however, that the mortgage was made for the sake of defeating the claims of these two litigants and of protecting the Franks, to whom he was indebted for the sale of horses and for moneys loaned, and from whom he expected to incur other debts by subsequent loans and purchases (pp. 41–52, fols. 162–166). This story, which was in the highest degree improbable as well as contradictory to his previous testimony in the Federal court, was absolutely denied by Mr. Samuel Frank, who swore that he had never heard of these negligence cases before the trial (p. 92, fol. 367). If they had discussed defrauding and had intended to conceal his assets from any people, would those not have been acknowledged creditors of Vogt, such as the plaintiff, Wanamaker and the other persons who had employed him to deliver goods for cash on delivery, who have put him into bankruptcy, and who are paying the expense of the litigation; not three poor common laborers, whose claims were based upon a few bruises, and were disputed by Vogt, and whose suits have never been heard of since they were begun?

Vogt further testified, that, after the date of the chattel mortgage, he sold horses, first estimating the number as twenty-five, then ten, which were covered by the chattel mortgage and which were worn

out so as to be unfit for his business (p. 58, fol. 231; p. 59, fol. 234).

He at first said: "Mr. Frank gave me consent; some of them he bought of me himself. He did not tell me nothing, what to do with the proceeds" (p. 58, fol. 232). On further cross-examination, he admitted that he did not know whether Mr. Frank bought any of him after the chattel mortgage in question was made (p. 59, fol. 233). He bought new horses in their place. "I had to, because I need them in my business" (p. 59, fol. 235; p. 57, fol. 228; p. 52, fol. 207; p. 46, fol. 181). Mr. Frank positively denied that he consented to the sale of any horses covered by this last chattel mortgage (p. 93, fol. 371).

There is no proof in the case that any judgments have ever been recovered against the bankrupt by any one The trustee, consequently, has no rights except so far as he represents creditors whose claims have not been reduced to judgment.

In accordance with rule 11, we herewith submit

The specifications of the errors relied upon.

I.—The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in refusing to direct a dismissal of the complaint in the action below, for the reason that the Supreme Court of the State of New York had no rightful authority to grant relief in a suit brought to determine the title to property in the possession of the United States District Court; and, furthermore, because the defendant had a contractual right to have all questions concerning the title to the same determined by that Court.

II.—The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

III.—The said Appellate Division erred in refusing to direct the dismissal of said complaint for the reason that the plaintiff below had no right to sue to set aside a chattel mortgage in a case where he did not represent a judgment creditor of the mortgagor.

IV.—The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

V.—The said Appellate Division for the Supreme Court of the State of New York erred in refusing to set aside so much of the judgment of said Supreme Court, in the County of Kings, as adjudicated concerning the title to a fund, which had been deposited under an order of the District Court of the United States for the Eastern District of New York.

VI.—The Supreme Court of the State of New York for the County of Kings erred in making such an adjudication.

VII.—The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in affirming the judgment of the Supreme Court of the State of New York for the County of Kings, hereinbefore referred to.

I.

This Court has jurisdiction of the writ of error.

U. S. R. S., Sec. 709, provides that

> " A final judgment or decree in any suit in " the highest court of a State, in which a " decision in the suit could be had, * * *

"where any title, right, privilege or immu-
"nity is claimed under the Constitution, or
"any treaty, or statute of, or commission held
"or authority exercised under, the United
"States, and the decision is against the title,
"right, privilege or immunity specially set
"up or claimed, by either party under such
"Constitution, treaty, statute, commission or
"authority, may be re-examined and re-
"versed or affirmed in the Supreme Court
"upon a writ of error."

Leave to appeal to the Court of Appeals was denied by the Appellate Division (pp. 107–108); and subsequently by Judge Bartlett of the New York Court of Appeals (p. 116).

(*a.*) The plaintiffs in error, who were defendants below, claimed an immunity from suit in the State court; and the title, right and privilege to have all questions concerning their title to the fund realized at the sale by a receiver of the United States District Court and deposited in that Court, determined by such Court.

They made this claim by motion to dismiss the complaint at the opening of the trial (pp. 31, 32, fols. 123–125); by a similar motion at the end of the plaintiff's case (p. 82, fols. 328–330); at the end of the trial and again upon the appeal to the Appellate Division (Certificate of Presiding Justice, p. 114, printed as made with the endorsement on the motion papers); and also immunity under the bankruptcy law from a suit by a trustee, who did not represent judgment creditors, to set aside the chattel mortgage.

(*b.*) The Appellate Division, the judgment of which, as well as that of the Special Term, is brought up for review by the writ of error (pp. 124, 125), was the highest court of the State of New York in which a decision in the suit could be had.

The suit was brought to set aside a chattel mortgage.

Subdivision 2 of Section 191 of the New York Code of Civil Procedure provides as follows:

> "No appeal shall be taken to said Court
> "from a judgment of affirmance hereafter
> "rendered in an action to recover damages
> "for a personal injury, or to recover dam-
> "ages for injuries resulting in death, or in an
> "*action to set aside a* judgment, *sale, trans-*
> "*fer, conveyance, assignment or written in-*
> "*strument*, as in fraud of the rights of cred-
> "itors, or in an action to recover wages, sal-
> "ary or compensation for services, including
> "expenses incidental thereto, or damages for
> "breach of any contract therefor, or in an ac-
> "tion upon an individual bond or individual
> "undertaking on appeal, when the decision
> "of the Appellate Division of the Supreme
> "Court is unanimous, unless such Appellate
> "Division shall certify that in its opinion a
> "question of law is involved which ought to
> "be reviewed by the Court of Appeals, or
> "unless in case of its refusal to so certify, an
> "appeal is allowed by a judge of the Court of
> "Appeals."

The Appellate Division of the Supreme Court for the Second Department is, consequently, "the highest court of a State in which a decision in the suit could be had," as is provided by U. S. R. S., § 709.

II.

The plaintiffs in error had a contractual right to have all questions concerning the title to the proceeds of the receiver's sale, determined by the Court of Bankruptcy, which appointed the receiver, under whose direction the sale took place, and in whose custody the proceeds were deposited.

The order directing the sale, which was entered upon consent of all the parties interested, directed that the proceeds, after the deduction of the expenses of the same, should be deposited in the People's Trust Company of Brooklyn

> "as a special fund, there to await the further order of the Court upon due notice to all creditors who have or may hereafter appear."

This was the most solemn form of contract known to the common law, a contract of record.

The Messrs. Frank consented to the receiver's sale which they had the right to prevent, upon the express condition that their right to the proceeds should be determined by the Federal court. The State court had no right to nullify that condition.

It is a flimsy subterfuge, to argue: that this is not a suit to determine the title to the fund, but merely an action to determine the validity of the chattel mortgage; and that consequently the contract and order of the Court, did not prevent the determination of that question by the State tribunal. The order provided:

> "That the lien, if any, of the said alleged "chattel mortgage of the said S. L. & S.

> "Frank be transferred to and attached to "said special fund or deposit, in lieu of and "to the same extent that it attached to the "said property hereinbefore directed to be "sold" (p. 14).

The determination of the title to the chattel mortgage was necessarily also a determination of the Franks' title to the fund (see Point VIII., *infra*, p. 29). If the State court had jurisdiction to pass upon that question, the Federal court must necessarily be bound thereby and must follow the same. The order, however, expressly took the matter from the jurisdiction of the State court and transferred it to the Federal Court of Bankruptcy. The Franks had a right to insist that this order should be obeyed.

In *Havens & Geddes Co.* v. *Pierek* (C. C. A.), 120 Fed., 244, 245, a fire insurance policy owned by the bankrupt was by agreement with the assignee of the same

> "transferred to the trustee; and he agreed "to hold the money to be realized on the "policy 'for the benefit of said Havens & "Geddes Company,'" the assignee, "subject "to the order of the United States District "Court for the Southern District of Illinois. "*Per Curiam.* It was unquestionably the "right of the District Court upon petition of "the trustee—certainly upon notice to the "Havens & Geddes Company—to determine "the right to the fund, because such action "had been stipulated by the agreement which "it had made. * * * The stipulation of "the parties— * * * provided in effect, "for the covering of the fund into the Reg- "istry of the District Court to be dealt with "by that Court, *the rights of the parties "thereto to be determined upon summary "petition.*"

In *Guaranty Trust Co.* v. *North Chicago St. Ry. Co.*, 130 Fed., 801, 813, upon which the defendants in error rely; it was merely *held* that the pendency in a Federal court of a creditor's suit against a lessor street railway company, in which a receiver had been appointed, was not a bar to a stockholder's suit in the State court to which the receiver was not a party, for an injunction against the delivery of an amended lease agreed to by the directors, which released stocks deposited in trust by the lessee as security. The bill also prayed a receiver of the stock. The Court did not hold that this receivership might be granted as incidental to the other relief. It said (p. 813): "That this prayer for relief beyond the jurisdiction of the State court did not prevent the plaintiffs from prosecuting their suit for so much as the State court had power to grant."

III.

Irrespective of the provision of the order on which the plaintiffs in error had a right to rely, the State court had no power to make any order affecting the title to a fund in the possession of a court of the United States.

Every court with equitable powers, in whose possession property is placed, whether tangible property or a fund, has exclusive jurisdiction to determine the validity of all claims to a lien upon the same, and to distribute that fund amongst the rightful owners. No other court has any power to interfere with such property.

This rule of general as well as of Federal jurisprudence applies to proceedings in bankruptcy. The

prosecution of this suit in the State court might have been enjoined by the Court of Bankruptcy. The judgment is, consequently, subject to reversal by this Court.

(*a.*) The general principle is well stated by Mr. Justice Mathews in *Covell* v. *Heymen*, 111 U. S., 176, 182:

> "The forbearance which courts of co-
> "ordinate jurisdiction, administered under a
> "single system, exercise towards each other,
> "whereby conflicts are avoided, by avoiding
> "interferences with the process of each other
> "is a principle of comity, with perhaps no
> "higher sanction than the utility which
> "comes from concord, but between State
> "courts and those of the United States it is
> "something more. It is a principle of right
> "and of law, and therefore of necessity. It
> "leaves nothing to discretion or mere con-
> "venience. These courts do not belong to
> "the same system so far as their jurisdiction
> "is concurrent; and although they co-exist in
> "the same space they are independent and
> "have no common superior. They exercise
> "jurisdiction, it is true, within the same
> "territory but not in the same place; and
> "*when one takes into its jurisdiction a specific*
> "*thing that is as much withdrawn from the*
> "*judicial power of the other as if it had been*
> "*carried physically into a different territorial*
> "*sovereignty.* To attempt to seize it by a
> "foreign process is futile and void."

(*b.*) There is no difference in principle, nor in practical importance, so far as this rule is concerned, between a suit where the State court directs its officer to exercise physical interference with property in the custody of the Federal tribunal, and one in which the decree of the State court affects the

title only to the same, without taking manual possession thereof.

In each case, the judgment of the Court which acquired prior jurisdiction is impeded, clogged and interfered with. It is, moreover, for the interests of justice that conflicts between decrees of co-ordinate tribunals should be avoided; and that the parties should not be tempted by the hope of thus gaining some apparent and at least temporary advantage, to indulge in "an unseemly scramble of litigants to speed cases in the respective courts of their preference" (Mr. Justice Field in *Sharon* v. *Terry*, 36 Fed., 337, 359, *infra*).

It has been so held repeatedly by the Federal courts.

Where a sheriff sells land, he merely delivers a deed, which purports to confer title thereto, and he exercises no physical control over the same. Yet, such a sale will be enjoined by the court of the United States with prior jurisdiction (*Julian* v. *Central Trust Co.*, 93 U. S., 193).

In *Gordon Trust Co.* v. *Kansas City Southern Ry. Co.* (C. C. A.), 146 Fed., 337, 339, the Circuit Court of Appeals for the Eighth Circuit said, speaking through Judge Sanborn:

> "The trust company under its former
> "name, State Trust Company, commenced a
> "suit in the Circuit Court of Jackson County
> "to obtain a decree that certain indebtedness
> "of the Gulf company to it was prior in lien
> "and superior in equity, to that of the mort-
> "gage foreclosed in the court below; and
> "that court properly enjoined its prosecution
> "because the consideration and adjudication
> "was expressly retained within its exclusive
> "jurisdiction (*State Trust Co.* v. *Kansas*
> "*City, Pittsburg & Gulf R. Co.* (C. C.), 110
> "Fed., 1016)."

In *Sharon* v. *Terry*, 36 Fed., 337, 359, Mr. Justice Field (Sawyer and Sabin, *JJ.*, concurring), in a suit

to cancel a paper purporting to be a marriage contract, enjoined the enforcement of a judgment of a State court, in a suit begun after the Federal court had acquired jurisdiction, which adjudged that the defendant had acquired, through such a marriage, an interest in certain property of the original plaintiff:

> "Where two judgments, relating to the "same subject, are irreconcilable, both cannot be enforced. One or the other must "give way, and the only reasonable test by "which the superiority of one over the other "is to be determined is that which is expressed "in the authorities cited, that the court "which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired "possession of the subject, it cannot be "rightly ousted by subsequent proceedings "in another court having no supervising or "appellate authority. If the time of the "rendition of the judgment, independently "of the commencement of the suit, were to "be the test, the superiority of judgment, as "counsel well observe, would depend on "mere accident or circumstances beyond the "power of the court or parties; as one court "may have a large calendar, and be blocked "up with business, creating great delay in "the disposition of causes, while the other "court may have few causes, and those of "minor importance, and thus be enabled to "speedily dispose of them. It would give the "latter court pre-eminence, because it is enabled, from paucity of cases, to dispose of "its calendar at an earlier day, and might, "as suggested, tend to an unseemly scramble "of litigants to speed cases in the respective "courts of their preference."

So, in *Jordan* v. *Taylor*, 98 Fed., 643, *held*, conversely, that a Federal court had no jurisdiction of a suit to set aside a sale made by executors upon the ground that the State court of probate which issued to them letters testamentary thereby acquired exclusive jurisdiction.

(*c.*) This rule has been applied to bankruptcy proceedings.

It is imperatively necessary that the State courts should be obliged to respect this rule in cases affecting funds in the possession of the courts of bankruptcy, in order that the supremacy of the United States, when exercising that power expressly granted by the Federal Constitution, may be recognized.

In such cases the courts of the United States can even interfere with property in the possession of the State courts.

> *Tefft* v. *Sternberg*, 40 Fed., 2, 6; *Moran* v. *Sturges*, 154 U. S., 256; *The Willamette Valley* (C. C. A.), 66 Fed., 565; *In re Watts and Sachs*, 190 U. S., 1, 32.

If the State courts were empowered to interfere, directly or indirectly, with funds in the hands of a court of bankruptcy, they might easily nullify the provisions of the bankruptcy law and dissipate a bankrupt's estate by distributing the same among resident creditors who claimed liens and preferences which Congress had not intended.

In *Whitney* v. *Wenman*, 198 U. S., 539, 552; it was held that, where the property affected by a conveyance or other instrument, purporting to convey the title to the same, has come into the possession of the Court of Bankruptcy, that court has jurisdiction of a suit or proceeding to cancel the same, although the instrument of which a cancellation is prayed, was made before the bankruptcy proceedings.

There a trustee in bankruptcy filed in a District Court of the United States a bill in equity,

praying a declaration that certain warehouse receipts covering property of a bankrupt and issued before the bankruptcy proceedings were fraudulent and void, for an account of the proceeds of the sale of the goods covered by those receipts, made by the receipt-holder, who had obtained the same from the receivers in bankruptcy, and also for an account of the proceeds of certain accounts collected by the receivers and paid to the receipt-holder. After citing *Bardes* v. *Hawarden Bank*, 178 U. S., 524; *Mueller* v. *Nugent*, 184 U. S., 1; *White* v. *Schloerb*, 178 U. S., 542, and *Bryan* v. *Bernheimer*, 181 U. S., 188; this Court said, speaking through Mr. Justice Day (552),

> "We think the result of these cases is, in "view of the broad powers conferred in Sec- "tion 2 of the bankrupt act, authorizing the "bankruptcy court to cause the estate of the "bankrupt to be collected, reduced to money "and distributed, and to determine con- "troversies in relation thereto, and bring in "and substitute additional parties when "necessary for the complete determination "of a matter in controversy, that when the "property has become subject to the jurisdic- "tion of the bankruptcy court as that of the "bankrupt, whether held by him or for him, "jurisdiction exists to determine contro- "versies in relation to the disposition of the "same and the extent and character of liens "thereon or rights therein. This conclusion "accords with a number of well considered "cases in the Federal courts. *In re Whit-* "*ener*, 105 Fed., 180; *In re Antigo Screen* "*Door Co.*, 123 Fed., 249; *In re Kellogg*, 121 "Fed., 333" (553). "The court had posses- "sion of the property, and jurisdiction to "hear and determine the interests of those "claiming *a lien therein* or ownership "thereof."

In re McMahon, C. C. A., Sixth Ct., 147 Fed. R., 684, 685, 686:

Headnote: "A court of bankruptcy which, by its "trustee, has possessesion of real estate of a bank- "rupt, has jurisdiction to determine all questions "in respect to title or to liens thereon, and may "entertain and determine a suit or petition by "the trustee against a mortgagee of the property to "set aside the mortgage as one given within four "months prior to the bankruptcy and void under "Bankr. Act., July 1, 1898, Sec. 67*e*, 30 Stat., 564, "c. 541 (U. S. Comp. St., 1901, p. 3449)."

Lurton, *J.* (Severens and Cochran, *JJ.*, concurring):

"We are now dealing with the jurisdiction of the "District Court which had possession through its "trustee of the property of the bankrupt against "which the protesting petitioner asserts a mort- "gage lien. If the District Court having possession "of the *res* did not have jurisdiction to hear and "determine claims to or against the *res*, unless the "claimant should consent, what court did? Could "the petitioner go into the State court and there "assert his lien and then obtain a decree for its "enforcement and thus deprive the court of "primary jurisdiction of the control and custody "of the controverted property? The possession of "the *res* draws to the Court jurisdiction of all "questions in respect to title or liens, irrespective "of citizenship. *Krippendorf* v. *Hyde*, 110 U. S., "276; 4 Sup. Ct., 27, 28; L. Ed., 145; *Toledo & Rd.* "*Co.* v. *Continental Trust Co.*, 95 Fed. R., 497; "36 C. C. A., 155."

There is nothing in the bankruptcy law which takes such cases out of the rule that such jurisdiction is exclusive.

In *Bardes* v. *Hawarden Bank*, 178 U. S., 24, the goods affected by the suit were in the possession of the defendant before the proceedings in bankruptcy were instituted. This Court there said, speaking through Mr. Justice Gray (532):

> "*The jurisdiction of the courts of the* "*United States over all matters and pro-* "*ceedings in bankruptcy, as distinguished* "*from independent suits at law or in equity,* "*was of course exclusive.*"

In *White* v. *Schloerb*, 178 U. S., 542, it was held that, after an adjudication in bankruptcy no action can be brought in a State court to recover property in the possession of the Court of Bankruptcy. And such an action was enjoined by the Federal Court.

In re Whitener (C. C. A.), 105 Fed., 180, 185, 186, Pardee, *J.*:

> "As the property, the ownership of which "is in dispute, was in the possession of the "trustee in bankruptcy as a part of bank- "rupt's property to be duly administered, "the District Court had jurisdiction to issue "an injunction restraining the proceedings "under a sequestration issued from the Dis- "trict Court of Bowie County, Tex., at the "suit of Ramseur, plaintiff, against Rodgers, "trustee, and to compel the return of the "property to the trustee. See *White* v. "*Schloerb*" (178 U. S., 542; 20 Sup. Ct., 1007; 44 L. Ed., 1183).
>
> "The property being in the custody of "the District Court sitting in bankruptcy, "that court had jurisdiction to entertain the "intervention filed by Ramseur, claiming the "property, and to hear and determine the is-

"sues presented by the intervention, not only
"on general principles (see *Morgan's L. & T.*
"*R. & S. S. Co.* v. *Texas Cent. Ry. Co.*,137
"U. S., 171; 11 Sup. Ct., 61; 34 L. Ed., 625),
"but under the specific provisions of Section
"2 of the Bankruptcy Act of 1898."

In re McCallum, 113 Fed., 393, 394, 395:

"The present application is the ordinary
"case of a claim against a fund in the hands
"of a court, and such claims the Court in
"possession of the fund has the right to hear
"and determine. It is an incident to the
"power to distribute, and, except where this
"power is expressly so limited by competent
"authority that a claim to a share of the
"fund must be sent to some other court for
"determination, the Court that has posses-
"sion of the fund is the proper tribunal to
"decide all controversies concerning its
"ownership. I do not deny the jurisdic-
"tion of the State courts to determine con-
"troversies, in proper cases, between the
"trustee and adverse claimants; but this, I
"think is not such a controversy. The claim
"here is essentially that the applicant be de-
"clared to have a superior right to a certain
"part of a fund about to be distributed. He
"is not asserting that he can recover any
"personal chattels from the trustee. What-
"ever title he may have had to the rugs
"themselves is gone, and his claim in one
"character or the other, has been transferred
"to the proceeds. * * * I think he ought to
"pursue the claim where they can all be heard
"in defense of their rights. * * * The
"application for leave to sue the trustee in
"the State courts is refused."

Re Antigo Screen Door Co. (C. C. A.), 123 Fed., 249, 251, 252 (cited with approval, *Whitney* v. *Wen-*

man, 198 U. S., 539, *supra*), is on all fours with the case at bar.

Head note:

> "Any court having in its possession a fund "about which there is a controversy has in- "herent jurisdiction and power to determine "such controversy, to the exclusion of every "other court.
>
> "Where a mortgagee, in possession of "property of a bankrupt, surrenders it to the "trustee, reserving the right to assert his "lien against the proceeds, such proceeds are "held by the court as assets of the bankrupt "estate, and in dealing with the fund it acts "as a court of bankruptcy."

Prior to the filing of the petition in bankruptcy, two chattel mortgages had been executed by the bankrupt. The mortgagee took possession of the property and advertised the same for sale four days before the filing of the petition in bankruptcy.

JENKINS, *J.*, 251, 252, 253:

> "Here the petitioner was in possession of "property claiming under the chattel mort- "gages in question. It was agreed that the "property should be turned over to the trus- "tee for sale by him, the proceeds to be "covered into the registry of the bankruptcy "court, the right of property to follow the "fund. This being done, and the fund being "placed in the registry of the bankruptcy "court and in the bankruptcy proceedings, "did that court have the right to determine, "as a court of bankruptcy and in the bank- "ruptcy proceedings, the respective rights of "the parties to that fund? We take it that "any court, whether one of equity, common "law, admiralty, or bankruptcy, having in its

" treasury a fund touching which there is
" dispute, may, by virtue of its inherent
" powers, determine the right to the fund
" thus in its possession. Jurisdiction in that
" respect is an incident of every court (*Havens*
" *& Geddes Company* v. *Pierek, Trustee*
" (C. C. A.), 120 Fed., 244; *In re McCallum*
" (D. C.), 113 Fed., 393). If otherwise, every
" court would be subject to the control of the
" co-ordinate courts, working havoc to the
" independence of judicial authority. A fund
" so possessed is in *custodia legis*, and right
" to it may *only* be asserted and determined
" in the court which possesses it (*In re*
" *Kellogg* (D. C.), 113 Fed., 120). See *White*
" v. *Schloerb*, 178 U. S., 542; 20 Sup. Ct., 1007;
" 44 L. Ed., 1183. * * * The mortgaged
" property was in equity the property of the
" bankrupt, subject to such lien as the mort-
" gagee had thereon. If its value was in ex-
" cess of a valid lien, that excess would go to
" the trustee. When, therefore, the property
" was turned over to the trustee as the prop-
" erty of the bankrupt, subject to the lien,
" the trustee held the property and its pro-
" ceeds as assets of the bankrupt and in the
" bankruptcy proceedings. We think the
" case is wholly different from *Bardes* v.
" *Hawarden Bank*, 178 U. S., 542; 20 Sup. Ct ,
" 1000; 44 L. Ed., 1175, which was a suit by
" the trustee against a third party claiming
" adversely, while here the third party had by
" agreement turned over to the Court the
" property in dispute with the right reserved
" to follow the fund. That fund was poten-
" tially in the custody of the Court in the
" bankruptcy proceedings as assets of the
" estate and was subject to the disposition of
" the banpruptcy court in that bankruptcy
" proceeding, under Section 2 (7) of the Bank-
" ruptcy Act (Act July 1, 1898, 30 Stat., 546,

"C. 541; U. S. Comp. St. 1901, p. 3421), which "empowers the Court to 'cause the estates of "bankrupts to be collected, reduced to money "and distributed, and determine controversies "in relation thereto except as herein other- "wise provided.' We are the more inclined "to adopt this construction of the act because "thereby a speedy and inexpensive method is "afforded of determining controversies with "respect to a fund, and the policy of the "bankruptcy act, as we think, sanctions this "summary mode of procedure, the parties "consenting thereto."

Re Kellogg 113 Fed., 120, 124; affirmed, C. C. A., 121 Fed., 333; s. c., *Hewit* v. *Berlin Machine Works*, 194 U. S., 123 (approved *Whitney* v. *Wenman*, 181 U. S., 539, 552);

Held that a District Court of Bankruptcy had the power to determine the validity of a mortgage upon property of the bankrupt, when the mortgaged property was in the possession of the trustee.

The Circuit Court of Appeals said, speaking through Judge Townsend (121 Fed., 333, 336):

"The controversies in relation to the bank- "rupt estate, which, by reason of the limita- "tions referred to in the clause 'except as "herein otherwise provided,' do not come "within the jurisdiction of the bankruptcy "courts, are those where the trustee must "bring an independent suit to assert title to "money or property not in the possession or "control of the trustee. These conclusions "are in accord with the decisions under the "former Bankruptcy Act (*Ray* v. *Norse-* "*worthy*, 23 Wall., 128, 134; 23 L. Ed., 116)."

In the same case Judge Hazel said, in the District Court (113 Fed., 124):

"Where the property is in the actual pos- "session of the Court, the right to decide

"conflicting claims is paramount, if not in-
"herent, in the Court first acquiring posses-
"sion. * * * The proceeds of the sale of
"the mortgaged property, indeed the prop-
"erty itself before the sale was directed by
"the bankruptcy court—the mortgaged prop-
"erty—was in the custody of that Court. It
"was party of the *res* over which this forum
"gained control by virtue of the adjudication
"in bankruptcy. It was held by the trustee
"as part of the bankrupt's estate, and the
"District Court, therefore, had jurisdiction to
"hear and determine the issues presented in
"the nature of a claim to, or lien upon, the
"assets of the bankrupt estate (see also *In re*
"*Whitener*, 105 Fed., 180; *In re Matthews*,
"109 Fed., 603; *Carter* v. *Hobbs*, 92 Fed., 594;
"*Ryttenberg* v. *Schefer*, 131 Feb., 313; *Re*
"*Leeds Woolen Mills*, 129 Fed., 922; *Re Lu-*
"*cius*, 124 Fed., 455; *Central Tr. Co.* v.
"*Worcester Cycle Mfg. Co.*, 128 Fed., 483)."

Alabama Gold Life Ins. Co. v. *Girardy*, 9 Fed., 142:

HEADNOTE: "A State court cannot reach
"funds which have been made by an officer
"of a Federal court on execution." The marshal held money collected on execution. To a rule directing him to pay the same to the plaintiff or show cause, he answers that the fund in his hands have been attached under process from a State court; *held* that the attachment of the State court was void, and the rule was made absolute; directing the marshal to pay the money to the execution creditor.

(*d.*) The bankruptcy act expressly confers upon Courts of Bankruptcy, full power to determine all controversies in relation to estates of bankrupts, of

which the Court or its officers have taken possession. The only controversies of which State courts are given jurisdiction are those between trustees and persons claiming, adversely to them, property of which neither the trustees nor the receivers in bankruptcy preceding them have taken possession.

Clause 7 of Section 2 of the Bankruptcy Act (30 St. at L., 544, 545) provides:

> "That the courts of bankruptcy have such "jurisdiction at law and in equity as will "enable them to exercise original juris- "diction in bankruptcy proceedings * * * "to (7) cause the estates of bankrupts to be "collected, reduced to money and distributed, "and determine controversies in relation "thereto, except as herein otherwise pro- "vide."

General Order XXIX., provides: that no money deposited under the orders of the Court of Bankruptcy "shall be drawn from the depositary, unless "by check or warrant, signed by the clerk of the "court, or by a trustee and countersigned by the judge "of the court, or by a referee designated for that "purpose, or by the clerk or his assistants under an "order made by the judge."

General Order XXVIII., gives power to the court of bankruptcy, to determine questions concerning the redemptions and discharge of "any mortgage "by them, pledged or deposited upon a lien upon "any property real or personal" of the bankrupt.

In the present case the estate of the bankrupt consisting of the horses, harness and wagons in question, has been reduced to money by the Court of Bankruptcy. That same court has the exclusive jurisdiction to determine controversies in relation thereto.

It was held in *Bardes* v. *Hawarden Bank*, 178 U. S., 524, 535, that:

> "Those words 'herein otherwise provided' "in clause 7, evidently refer to Section 23

" of the act. That section, it has been held, " in decisions of this court, subsequent to the " Bardes case, applies only to suits which " affect the title to property which has not " been brought within the jurisdiction of the " court of bankruptcy."

In the *Bardes* case an accounting was sought as well as the cancellation of a conveyance.

In *Bush* v. *Elliott*, 202 U. S., 477, 479, this court said, speaking through Mr. Justice Day: " In later " cases it has been held that the decision did not ex- " tend to cases wherein the bankrupt court had ac- " quired jurisdiction over the subject matter of the " property as that of the bankrupt, as to which the " bankrupt courts have been held to have jurisdic- " tion under the power conferred in subdivision " seven, section two, of the act."

That subdivision 7 of Section 2 applies to the case at bar, is held in the authorities cited under (*b*,) *supra;* amongst others *Whitney* v. *Wenman*, 198 U. S., 539; *In re Whitener* (C. C. A.), 105 Fed., 180; *In re McCallum*, 113 Fed., 393; *In re Antigo Screen Door Co.* (C. C. A.), 123 Fed., 249; *In re Kellogg*, 113 Fed., 120; S. C. C. A., 121 Fed., 333; *Havens & Geddes Co.* v. *Pierek*, C. C. A., 120 Fed., 244.

The jurisdiction given to the State courts in suits by trustees applies only to suits against persons claiming property adversely to the bankrupts' representative.

Mueller v. *Nugent*, 184, U. S., 1; *Matter of Muncie Pulp Co.* (C. C. A.), 139 Fed., 546.

(*e.*) It makes no difference whether the objection to the jurisdiction of the State court is made by the trustee or by a claimant to a part of the fund in the Court of Bankruptcy. Each alike can assert the right to have his title adjudicated by the Court of Bankruptcy.

Here, the grievance of the plaintiffs in error is

clearly apparent, since after the trustee had instituted proceedings upon the subject in the Court of Bankruptcy, and had been met there by testimony which seemed fatal to his contention; he abandoned that litigation and sought a fresh tribunal, which he considered would be less affected by the self-contradiction of the witness, when testifying a second time, than one which had seen and heard the testimony upon the first examination.

IV.

The fact that the State court acted beyond its powers, and that its judgment is void and would not be binding collaterally, is no reason why this Court should not adjudicate the transgression and set aside the void decree.

It was suggested by the Presiding Justice of the Appellate Division on the argument: that, if our position was correct and the judgment of the State court was void and would not be binding upon the Federal court when an application was made for the payment of the fund; we could not be prejudiced nor aggrieved by the existence of such an invalid judgment.

Judgments of this character by the State courts have frequently been reversed by this Court upon writ of error.

Thus, it has been held that the State courts have no power to issue a writ of replevin to recover property in the custody of a marshal of the United States; that such a writ is void; and that a judg-

ment of a State court in an action thus begun will be reversed by this Court.

Freeman v. *Howe*, 24 How., 450; *Covell* v. *Heymen*, 111 U. S., 176.

In *Covell* v. *Heymen*, 111 U. S., 176, 182; quoted more at length, *supra*, p. 14, Mr. Justice Mathews said, speaking for this Court upon the reversal of the judgment of the State tribunal:

> "When one takes into its jurisdiction a "specified thing, that is as much withdrawn "from the judicial power of the other, as if "it had been carried physically into a differ- "ent territorial sovereignty. To attempt to "seize it by foreign process is futile and void."

After a petition for a removal with the requisite bond has been duly filed, the State courts have no further jurisdiction to proceed with the case. Should they attempt to exercise such jurisdiction their proceedings may be enjoined by a court of the United States (*Abeel* v. *Culberson*, 56 Fed., 329; *Wagner* v. *Drake*, 31 Fed., 849; *Baltimore & O. R. Co.* v. *Ford*, 35 Fed., 170). Yet such subsequent proceedings will be reversed by this Court upon a writ of error (*Removal Cases*, 100 U. S., 457; *Southern Ry Co.* v. *Allison*, 190, 326).

Should the judgment below be allowed to stand, it would undoubtedly be followed by the Court of Bankruptcy.

V.

The execution of the mortgage for a larger amount than was then due in order to provide for future indebtedness was no badge of fraud.

It is well known that mortgages are frequently so made in the course of business.

Frost v. *Warren*, 42 N. Y., 204; *Truscott* v. *King*, 6 N. Y., 147.

VI.

The surrender of the chattels by the mortgagor to the mortgagees cured any previous defects or fraud in the chattel mortgage.

Castleman vs. *Mayer*, 55 App. Div., 515; aff'd. 168 N. Y., 354.

VII.

There is nothing in the Federal Bankruptcy Law which gives the State court jurisdiction in cases of this character.

The limitation in Section 23 is upon the jurisdiction of the Circuit Courts alone, and does not affect the powers of District Courts in bankruptcy. It applies only to plenary suits begun by the service of a common law writ or the equitable process of subpœna; "*as distinguished from proceedings in bankruptcy*," not to summary proceedings instituted by petition against property, or a fund in the possession of the Court (*Havens & Geddes Co.* v. *Pierek* C. C. A), 120 Fed., 244, 245, quoted *supra*, p. 12).

VIII.

The case cannot be sustained as an action to set aside the chattel mortgage.

The chattel mortgage was no longer in existence. The action of the Franks in taking possession of the property amounted to a foreclosure of this mort-

gage; and that foreclosure, if then imperfect, was completed by the receiver's sale. The chattel mortgage thereupon ceased to exist and became of no effect, except as evidence of the plaintiffs' rights in the fund in the possession of the Court of Bankruptcy. As a mortgage, its functions had ceased. The validity of the rights thereunder would not have been affected by the failure to refile the same at the end of a year, as is required to keep chattel mortgages alive under the New York statute. A judgment setting the same aside, which did not, as is the case of that brought up for review, expressly attempt to cancel the lien upon the fund in the possession of the Court of Bankruptcy, would have been mere *brutum fulmen*, and could have had no effect.

This action could not be supported, as was claimed below, as a suit to remove a cloud upon the plaintiff's title. Such a suit can only be maintained by a party in possession of vendible property to cancel a document which clouds the title thereto, so that it is not marketable and cannot be sold.

The plaintiff's interest in the fund here is not vendible nor marketable. The case, consequently, falls under no head of equitable jurisdiction.

If we dig to the root of the matter, pushing aside legal nomenclature, it is clear that the rights of the mortgagees are now entirely different from those secured by the mortgage. While the chattel mortgage was in existence, the rights of the Franks were to take possession of the property, sell the same and keep so much of the proceeds as was necessary to satisfy the amount owed them by Vogt. By the proceedings in the Court of Bankruptcy, they surrendered all these rights and received others in exchange. They have surrendered the possession of the property giving it to the receiver. They no longer have the right to sell the horses, wagons and harness. They have allowed the receiver to sell the same. They have voluntarily given up the legal title to the property which as chattel mortgagees, was vested in them. All the rights that they have

now are the new ones guaranteed them in exchange for these surrenders: the right to have the Court in Bankruptcy exclusively determine whether in equity they are entitled to the proceeds of the same.

IX.

The trustee had no right to attack the validity of the chattel mortgage.

It nowhere appears that the trustee represented any but contract creditors. He consequently had no right, which they could not exercise. Since they could not have sued to set aside this conveyance for fraud, he was equally powerless.

In *York Manufacturing Co.* v. *Cassell*, 201 U. S., 344, 352, Mr. Justice Peckham said:

> " Under the provisions of the bankrupt act
> " the trustee in bankruptcy is vested with no
> " better right or title to the bankrupt's prop-
> " erty than belonged to the bankrupt at the
> " time when the trustee's title accrued. At
> " that time the right, as between the bank-
> " rupt and the York Manufacturing Company,
> " was in the latter company to take the ma-
> " chinery on account of default in the pay-
> " ment therefor. The trustee under such
> " circumstances stands simply in the shoes of
> " the bankrupt and as between them he has
> " no greater right than the bankrupt."

This Court then cited with approval *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, which held; that a trustee in bankruptcy could not take advantake of the New York Statute of Frauds concerning the sale of personal property, because " the trustee was not " a subsequent purchaser, pledgee or mortgagee in

" good faith." The last case affirmed, *In re Kellogg*, 112 Fed., 52; s. c. (C. C. A.), 118 Fed., 1017.

In re New York Economical Printing Co. (C. C. A.), 110 Fed., 514, s. c. 112 Fed., 52; *held*, that a trustee in bankruptcy could not sue to set aside a chattel mortgage because of a failure to comply with the New York statute.

X.

The judgment should be reversed, with costs, and the Special Term of the Supreme Court of the State of New York should be directed to enter judgment in favor of the defendants dismissing the complaint, with costs, in this Court, and in the Court below.

ROGER FOSTER,
Of Counsel for Plaintiffs in Error.

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(20,061)

FILED
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JAMES H. McKENN
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Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. FRANK,

Plaintiffs-in-Error,

against

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, and JACOB VOGT,

Defendants-in-Error.

OCTOBER TERM, 1906.

No. 184.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

FRANCIS B. MULLIN,
Attorney for Defendant-in-Error Vollkommer,
"TEMPLE BAR," 44 COURT STREET,
Brooklyn, New York.

C. G. ROGERS, Walker and Centre Streets, N. Y.

(20,051)

Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. Frank,

Plaintiffs-in-error,

AGAINST

JOSEPH VOLLKOMMER, JR., as trustee in bankruptcy of the estate of Jacob Vogt, a bankrupt, and JACOB VOGT,

Defendants-in-error.

OCTOBER TERM, 1906, No. 184.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

Preliminary Statement.

In anticipation of certain statements which may be made by plaintiffs-in-error, counsel wishes the Court here to be clearly and certainly advised of the following facts, and accordingly sets them forth, notwithstanding that plaintiffs-in-error may make some reference thereto in their brief:

1. The action was brought and tried as an action *by the trustee* to set aside a chattel mortgage of $8,500, made by the bankrupt, *within four months of the adjudication of bankruptcy*, as made to

hinder, delay and defraud creditors (*Record*, pp. 3, 4, 5, 8, 24, 29, 32, 109).

2. *Before* adjudication of bankruptcy, the mortgaged chattels were sold free of liens *by the receiver in bankruptcy* (certain creditors having stopped by injunction an attempted sale thereof by the plaintiffs-in-error, the chattel mortgagees), and the Receiver took possession thereof *with the consent of the plaintiffs here, and certain creditors.* The proceeds of the sale, amounting to $5,481.47, were deposited by the receiver, pursuant to an order, *as a special fund*, to await the further order of the Court, the lien of the mortgage, if any, to attach to such proceeds as to the mortgaged chattels; *but said order did not provide in what court the alleged lien of plaintiffs here should be determined*, nor confine the trustee or any party in the choice of a forum for the purpose of testing the validity of such alleged lien (*Record*, pp. 6, 12–14, 17, 63–64).

3. *It is not true, and there is absolutely no support in the record for any statement, that the trustee ever instituted any proceeding in the bankruptcy court, with a view to obtaining the fund aforesaid;* or that he was dissatisfied with the bankrupt's testimony before the Referee in the bankruptcy court; or that the trustee resorted to the State Court from any unfair or ulterior motives. *It is true* that the trustee conducted the usual general, preliminary and advisory examination of the bankrupt in the bankruptcy court—*nothing more.* The trustee brought the suit in the State Court simply because his counsel advised him, after examination of the law and decisions, that the State Court was the proper place in which to bring it.

4. *It is not true* that the negligence cases referred to in the record were never tried, nor is there any support for such statement in the record; as a matter of fact, *judgments were recovered by plaintiffs in each of these suits.*

5. Although it is correct that the plaintiffs-in-error, chattel mortgagees, took possession of the mortgaged chattels, *it is also true that they were wrested from their possession by the bankruptcy court*, by its process of injunction and its Receiver (*Record*, pp. 63, 64).

6. Any mortgages held by plaintiffs-in-error prior to the one in suit were never properly filed in the proper county (*Record*, p. 75).

7. As the bankrupt testified, the mortgage in suit was made with the following understanding (*Record*, p. 42):

> "We were talking about making it $8,500 on account of them law suits I had against me, *and to protect Frank and myself.* Mr. Frank told me, '*If you make the mortgage $8,500, if they do sue you and get a judgment against you, they cannot get nothing. I have a mortgage on everything you have got.*' "

8. It nowhere in the record affirmatively appears that there were not judgment creditors represented by the trustee; *indeed, the inference is that there were such*, as the entire bankruptcy record, with some minor exceptions, was in evidence before the Court below, but is not returned to this Court (*Record*, p. 82). *Nor was any motion made at the trial to dismiss the complaint, or for other relief, on the ground that the trustee did not represent judgment creditors* (*Record*, pp. 31, 32, 82, 83).

It has been thought proper by defendant-in-error VOLLKOMMER to make the foregoing statements of fact, although many of them may be to points immaterial or not in review in this court, in order that this Court might be protected against any erroneous impression of the substantial and abiding merit of the cause of the plaintiff-trustee, which might be presented to it.

POINTS
ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

I.

The Supreme Court of the State of New York had jurisdiction of the cause.

(a)

Suits *by the trustee* in bankruptcy (and the case at bar is one), are cognizable in the State Courts, by the following clear prescription of the National Bankruptcy Act (Sec. 23, Subd. *b*) :

> "Suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section sixty, Subdivision b, and Section Sixty-seven, Subdivision e.*"

And also, more specifically, as to suits to set aside fraudulent conveyances, of which the case at bar is an example *(Record*, pp. 3–8, 23, 24, 29, 30), by the following sections :

> SECTION 67; SUBDIVISION E. "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act, subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover

and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Corrt which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

SECTION 70; SUBDIVISION E. "The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the persons to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

The words *in italics* in each of the above quotations from the Act, were added by the Amendatory Act of the 5th February, 1903; but in the case at bar we have not to deal directly with the Act as amended, but only as originally passed on the 1st of July, 1898, since this action was commenced on the 20th December, 1902 (*Record*, p. 1), before the amendment; and since the Amendatory Act itself provides (Sec. 19) that it shall not apply to pending cases. Moreover, the amendment could not affect the question here, which is, essentially—Has the bankruptcy court *exclusive* jurisdiction of this cause?—because it merely gives to the bankruptcy court *concurrent*, not *exclusive*, jurisdiction over the actions referred to, of which this is one.

The Amendment gives the bankruptcy court jurisdiction where it had none before. The State Courts retain jurisdiction as before, simply dividing it with the bankruptcy court (*Gregory vs. Atkinson*, 127 Fed. Rep., 183; *Collier on Bankruptcy*, 5th Ed., pp. 265–7, 269, 272, *infra*).

It is not questioned on this Record that the Supreme Court of the State of New York, in and for the County of Kings, wherein the trustee brought this suit, and this cause was tried, is the Court "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them [suits], if proceedings in bankruptcy had not been instituted."

The text-writers and the cases, in amplification of the manifest intent and effect of the statute quoted, have declared in unequivocal terms for the jurisdiction of the State Courts in cases similar to the one at bar:

Bardes vs. Hawarden Bank, 178 U. S. 524, and two following cases.
Collier on Bankruptcy, 5th Ed., p. 272, *infra.*
Wall vs. Cox, 181 U. S., 244.
Brandenburg on Bankruptcy, 3rd Ed., Sec. 581.
Jones vs. Schermerhorn, 53 N. Y. App. Div., 494.
Silbertstein vs. Stahl, 32 N. Y. Miss., 353; *affirmed*, 63 N. Y. App. Div., 614; *affirmed*, 171 N. Y., 649.
Small vs. Muller, 67 N. Y. App. Div., 143.
Bryan vs. Madden, 109 N. Y. App. Div., 876.

Foster's Federal Practice, 3rd Ed., p. 1085, where is found an accurate statement of the law as above in this able treatise by *the learned counsel for the plaintiffs-in-error.*

The amendment above referred to changed the ruling in the celebrated *Bardes case* (cited, *supra*), that the jurisdiction of suits *by the trustee* rested *exclusively* in the State Courts, only so far as to grant *concurrent* jurisdiction to the bankruptcy court in the particular cases specifically mentioned in the amendment, and no others (*Gregory vs. Atkinson*, cited *supra; Brandenburg on Bankruptcy*, 3d Ed., Sec. 574); but this decision, and the other authorities above cited, in affirming the existence and propriety of jurisdiction in the State Courts, are still sound law.

(b)

But plaintiffs in error seek to take this cause out of the operation of the general rule so clearly announced in Statute and decision, *by the claim that the single fact of the possession by the bankruptcy court of the proceeds of the sale of the mortgaged chattels deprives the State Court of a jurisdiction, which, otherwise, it conced-*

edly would have, a jurisdiction to set aside and declare void the mortgage as fraudulent.

It is thought that plaintiffs in error have misconceived and misapplied the reasoning of certain of the adjudged cases, and have not correctly apprehended the scope of the action under review.

Defendant in error is not here to contend that the bankruptcy court would have had no jurisdiction of this action; but he insists that the State Court *had* jurisdiction.

Diligent research fails to show any decision adverse to the existence of jurisdiction in the State Court, under the precise facts which here obtain; there are many that affirm such jurisdiction. No case has gone to the unseemly extent of declaring that the deposit of the funds in the bankruptcy court, vested that court of *exclusive* jurisdiction of all actions or proceedings, affecting the funds in any manner, directly, collaterally, or incidentally; yet such appears to be the proposition advanced by plaintiffs on this record.

In limine let it be thoroughly understood that:

1. This action did not seek *to recover the fund*, or in anywise *to interfere therewith (Record*, pp. 8, 29, 32, 109).

2. It does not affect the *possession* of the fund *(id.)*.

3. *The judgment under review simply sets aside the mortgage as made to hinder, delay and defraud creditors (Id.)*.

4. It is *a necessary incident* only, of a judgment declaring the mortgage void, that the fund is freed of the lien of the mortgage *(Id.)*.

5. *It is the trustee* himself, *an officer of the Bankruptcy Court (Bankruptcy Act*, Sec. 1, Subdv. 18), who resorted to the State Court, and prayed its hearing of his cause.

6. In seeking this relief, and in its award, no principle of comity was violated, no interference with the Bankruptcy Court was suffered.

Skilton vs. Codington (185 N. Y., 80), is a splendidly considered case in the New York Court of Appeals, in which the Court, by CULLEN, J., sustained jurisdiction by the State Court (pp. 84–86) of an action very similar to that at bar. There, the trustee in bankruptcy, under the order of the Bankruptcy Court, as here, retained a part of the proceeds of the sale of mortgaged chattels for the benefit of any liens that might be established. *The trustee was*

sued by the mortgagee in the State Court to recover the amount of his mortgage; and it was *held*, that *notwithstanding the possession of the fund by the Bankruptcy Court, the State Court had jurisdiction of an action to establish the mortgagee's lien. A fortiori* must the State Court have jurisdiction where the suit is *by the trustee*, as here, and not *against him*, as in the cited case.

A case which bears exactly upon the question in hand, and furnishes precise analogous authority for the jurisdiction of the State Court in the case at bar, is *Bindseil vs. Smith* (61 N. J. Eq., 645). There a trustee in bankruptcy sought to acquire the legal title to choses in action, which, as alleged, had been preferentially assigned to defendant by bill in the Court of Chancery of New Jersey, before bill filed, defendant had been enjoined by the Bankruptcy Court from disposing of the property. It was claimed for the defeudant that the Court had no jurisdiction, because the Bankruptcy Court had taken control of the property. The Court thought that nothing in the bankruptcy proceedings affected the the rights of the trustee to determine for himself in what forum, within those permitted by law, he would bring his action. And the Court said (p. 647):

> "The question whether the District Court has, by its injunction, taken such control of the property as will interfere with the power of the defendant to surrender it to the trustee, in case the Court of Chancery should require him to do so, will be more properly presented for consideration after the right of the trustee is ascertained. *It is unlikely that any difficulty can arise, seeing that the trustee has been appointed by the federal court, and that according to the decision of the Federal Supreme Court, the jurisdiction of the state court is complete.*"

Re Platteville Foundry and Machine Co. (147 Fed. Rep., 828, 831-2), the United States District Court for the Western District of Wisconsin, SANBORN, J., refused to enjoin a suit for trover in the State Court against the trustee in bankruptcy, by a chattel mortgagee, where the mortgaged chattels had been sold by the trustee, and the bankruptcy Court had the funds, and said:

> "By the action of trover, sought to be restrained under this order, *the mortgagee in no way seeks to divest the possession of the Court of the proceeds of the sale. The object of that suit is to test the validity of the mortgage* and the right of the mortgagee to a judgment against the trustee."

That the trustee may be sued in trover in the State Court is also held in the following cases:

> *Truda v. Osgood*, New Hampshire Supreme Court, 71 N. H., 185. holding that *the State Courts have concurrent jurisdiction of all actions to try the title to a bankrupt's property, even where the trustee has possession thereof*, provided the form of the action is such that *the judicial custody thereof is is not interfered with.*
>
> *Re Spitzer*, Second Circuit Court of Appeals, 130 Fed. Rep., 879.
>
> *Re Kanter & Cohen*, same Court, 121 Fed. Rep., 984.
>
> *Re Russell*, same Court, 101 Fed. Rep., 248, 250.

Notwithstanding the possession of the fund by the Bankruptcy Court, it is perfectly proper, and consistent with comity, as has been said already, to permit the trustee to sue in the State Court, to avoid the mortgage; for such a suit does not interfere with the possession of the fund; and the fact that it involves matters having a close connection therewith, does not inhibit the State Court from accepting jurisdiction (*Guaranty Trust Co. vs. North Chicago St. R. Co.*, 130 Fed. Rep., 801). In the case cited, the Seventh Circuit Court of Appeals learnedly considers the rule applicable in circumstances similar to those here, and refuses to enjoin a suit in a State Court affecting collaterally a subject matter in the possession of the Federal Court; and further holds that where the suit in the State Court asks for relief which might be an interference with the possession of the Federal Court, that this does not warrant enjoining the suit, where the principal relief sought would not be a direct interference. The Court cannot fail to find this case helpful, and in entire support of defendant's position here.

In *Buck vs. Colbath* (3 Wall., 334), a case in this Court, it was held that a United States Marshal having goods in his possession might be sued in trover in the State Court, and Mr. Justice MILLER said (p. 345):

> "But it is not true that a Court having obtained jurisdiction of a subject matter of a suit, and of the parties before it, *thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court*, and in some instances requiring the decision of the same question exactly."

Where the trustee, as here, voluntarily submits to the jurisdiction of the State Court, he is bound by the judgment :

Scott vs. Kelly, in this court, 12 Nat. Bk. Reg. Rep., 96.

Winchester vs. Heiskell, also in this court, 119 U. S., 450, s. c. 120 U. S., 73, holding that because the trustee is bound, the creditors are also bound.

Re Reynolds, 133 Fed. Rep., 585, 587. HUNT, J. United States District Court, District of Montana.

(c)

A multitude of cases were cited in the courts below by plaintiffs here, in alleged support of their contention that the state court had no jurisdiction of this cause. They, and any which may or can be cited here, stand for the proposition, simply, that where the fund is in the bankruptcy court, that court has jurisdiction of actions or proceedings to distribute it, and try title thereto ; in none is this jurisdiction claimed to be exclusive ; in none, in fact, was the question presented which is attempted to be made here.

Counsel will endeavor to consider and analyze the more prominent of these cases, which are likely to be relied upon here.

In the case of *Ryttenberg vs. Schefer* (131 Fed. Rep., 313), cited below by plaintiffs here, *the defendant consented* (pp. 317, 318) to the jurisdiction of the bankruptcy court. Under Section 23*b* of the Bankruptcy Act this consent conferred jurisdiction. There was no question of exclusive or conflicting jurisdiction in the case.

Re Leeds Woolen Mills (129 Fed. Rep., 922) simply decided that where property was in the custody of the Bankruptcy Court, that Court could determine the rights of all claimants thereto. There was no question of exclusive jurisdiction ; indeed, the Court expressly said (p. 923) :

> "* * * the simple fact of this possession by the referee in bankruptcy is conclusive in favor of our jurisdiction. By that possession the goods were *in custodia legis*—whether rightfully or wrongfully is another question. But that question may be rightfully decided by us. *Whether it might also be rightfully decided by any other jurisdiction it is not necessary to determine.*"

Re Lucius (124 Fed. Rep., 455) concerned merely the jurisdiction of the Bankruptcy Court to determine the bankrupt's right to

an exemption—a question very different from that here. The case has no bearing whatever, and was very ill-cited.

Re Rodgers (125 Fed. Rep., 169, 177) simply holds that the Bankruptcy Court has jurisdiction when the property is in its possession; it relates in no way to the question of exclusive jurisdiction. It is not seen that *Central Trust Company of New York vs. Worcester Cycle Mfg. Co.* (128 Fed. Rep., 483) has even the slightest bearing on the question under consideration.

The head-note *Re Antigo Screen Door Co.* (123 Fed. Rep., 249), quoted below by plaintiffs here, is misleading. The Court *does not* there decide that the Bankruptcy Court, having possession of the property, has *exclusive* jurisdiction; it simply holds that it *has* jurisdiction. That was the only question of jurisdiction presented for decision in that case. Any decision or statement that the jurisdiction found to exist in the Bankruptcy Court was exclusive must be purely *obiter*, though a perusal of the opinion shows that no such statement is made therein, and the head-note is thus unsupported by the opinion in the particular mentioned. Moreover, in that case, the stipulation under which the property was sold, and the money deposited in the Bankruptcy Court, provided that the claimant, a bank, might proceed *in the Bankruptcy Court* to enforce its rights (p. 251, Statement of Facts). There was no such provision in the stipulation in the case at bar. In the case cited, too, the application was directly *for possession of the fund.* Here the action does not affect the fund or possession thereof, except consequentially, as it affects the mortgage; the possession of the fund is not sought, nor interfered with.

Re Kellogg (113 Fed. Rep., 120), cited in the case last considered, and quoted from at length below, by plaintiffs here, is merely a cumulative statement of the rule, against the soundness of which defendant has no disposition or interest to contend, that the bankruptcy court, having possession of the fund, may determine the rights of claimants therein; it is not a decision that the bankruptcy court's jurisdiction is exclusive—that question was not in the case—and that another court might, with propriety, pass upon the validity of a transfer claimed to be a lien on the fund, was expressly recognized by the Court in the case cited, when it said, at page 123:

> "* * * the district court * * * had jurisdiction to hear and determine the issues presented in the nature of a claim to, or lien upon, the assets of the bankrupt estate. * * * *It may be quite true that the trustee, in the*

exercise of discretion, had a right to institute an action in the proper tribunal to annul the mortgage on account of its invalidity due to its usurious origin. But, manifestly, where two remedies are open to a trustee, one affording relief in the forum creating his trust, and pointing out a very simple and less expensive method of attaining his end than is attainable by the other; then the trustee's duty is to pursue that remedy according to the nature of the controversy, where Congress intended such remedy or procedure should be instituted."

In the case cited the Court intimated that if proper application had been made, the controversy would have been determined in the State Courts (p. 126, *supra*).

Re Whitener (105 Fed. Rep., 180), is of no assistance to plaintiffs-in-error. It decides that the bankruptcy court may enjoin a suit in the State Court against its trustee *to recover possession* of property in his custody. *This* is not an action *against* the trustee to take property from him, but an action *by the trustee* to set aside a transfer. The distinction is manifest from its mere statement. *Carter vs. Hobbs* (92 Fed. Rep., 594) is, obviously, overruled by the *Bardes* case, and other cases cited *supra*. Its citation was inexcusable. *Re Matthews* (109 Fed. Rep., 603) the bankruptcy court had jurisdiction *by consent;* nor was there any question of exclusive jurisdiction.

Re McCallum (113 Fed. Red., 393) is no authority for plaintiffs' position. It was merely an application for leave to sue the trustee in the State Court, which was denied *as a matter of discretion.* The distinction must constantly be observed between suits *by* and suits *against* the trustee. It is adverted to in the case cited, and the reasoning of the opinion shows that there is no doubt of the jurisdiction of the State Courts to entertain suits *by* the trustee, as well as some suits against him. There was no question of exclusive jurisdiction in the case. The Court admitted that it might, in obedience to statutory provision, be proper to determine right to and possession of a fund in a Court other than the Court in possession thereof (p. 294, *infra).* The application in the case cited was *to recover possession* of the fund; here the suit has not such object; it seeks merely to set aside a transfer.

The cases of *Alabama Gold Life Insurance Company vs. Girardy* (9 Fed. Rep., 142), *Covell vs. Heyman* (111 U. S., 176), *Re Tyler* (149 U. S., 164), *Merritt vs. American Steel Barge Co.* (79 Fed. Rep., 228) and *White vs. Schloerb* (178 U. S., 542), cited below by

plaintiffs here, are useless to them. They hold, what is undoubtedly the law, that where a Court or its officer has taken possession of property, the same may not be re-taken by process of another Court, in a suit *against* the officer. That is not this case. This action is brought *by* an officer of the Court said to be in possession. It is not to *divest* him of title or possession, but to perfect his title or possession already existing.

Havens & Geddes Company vs. Pierek (120 Fed. Rep., 244), relied upon by plaintiffs-in-error did hold, as have many other cases, that the bankruptcy court, having possession of a fund by agreement of a creditor of the bankrupt and his trustee, "subject to the order of the court," might, on summary application, determine the rights of those interested in the fund. Defendant does not contend against the principle of this case. He claims the case at bar is not within it. It is notable that in the cited case, the Seventh Circuit Court of Appeals held that *the bankruptcy court would not have jurisdiction of a plenary suit in equity by the trustee against the creditor to determine right in the fund*, such jurisdiction being in the state court alone: a holding very far indeed from plaintiffs' claim here that under similar circumstances the bankruptcy court alone had jurisdiction.

When a court has obtained *exclusive jurisdiction* of a cause or matter, it may indeed enjoin proceedings in another court; but the cases which so hold are of no use to plaintiffs here, because *they start* with the proposition that the first court has obtained exclusive jurisdiction, which is the question here to be determined. Then, if the court having exclusive jurisdiction, or a superior propriety in assuming jurisdiction, fails to enjoin proceedings in another court, they are valid. Plaintiffs here have never invoked injunctive relief against the exercise of jurisdiction by the state court. Nor could they have successfully done so.

In the case of *Guardian Trust Company vs. Kansas City Southern Railroad Company* (146 Fed. Rep., 337), *a case relied upon by plaintiffs here*, the Eighth Circuit Court of Appeals said by SANBORN, J. (p. 340):

> "But the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a Federal Court of Equity and no issue of which it has acquired exclusive jurisdiction presents no ground for a dependent bill to stay it" (Citing many cases).

Whitney vs. Wenman (198 U. S., 539), holds that where the bankruptcy court has possession of property that it may determine the rights of claimants thereto. It does not hold nor infer that such jurisdiction is exclusive. The same is true of *Re M'Mahon* (147 Fed. Rep., 684); and it should be noted that both of these cases arose and were decided *after the amendment to the Bankruptcy Act of the 5th February, 1903*, above referred to.

Bush vs. Elliott (202 U. S., 477), simply holds that the trustee, under Section 23 of the Act, might sue *for a debt due the bankrupt*, in a court in which the bankrupt might have sued therefor, if bankruptcy had not intervened.

It would appear from *First Nat. Bank vs. Title & Trust Co.* (198 U. S., 280), that the chattels in the case at bar *are not in the possession of the bankruptcy court*, within the meaning of the cases upon that point: for in the cited case, as here, the goods were taken by the bankruptcy court from the possession of the claimant, *and sold, with his consent, and the proceeds deposited subject to the further order of the Court* (pp. 280, 283, 287), and it was held, that the bankruptcy court was without jurisdiction to distribute the fund, Mr. Chief Justice FULLER saying (p. 291):

> "The Court of Appeals sustained the jurisdiction of the District Court upon the ground that it had acquired a fund and had jurisdiction to dispose of it, *but we do not think that a court of bankruptcy can create a jurisdiction forbidden by Statute.*"

Mueller vs. Nugent (184 U. S., 1), merely held that the Bankruptcy Court could compel a bankrupt, or one holding property for his benefit, to deliver same to the trustee, *where the person holding same made no adverse claim thereto*, but simply refused to surrender same; and so of *Re Munice Pulp Co.* (139 Fed. Rep., 546).

Any other cases in the books, which may be cited to this point, will be found, on close examination, to have no more application thereto than the cases above considered.

(*d*)

It is probable that even in the absence of an express act of Congress the State Courts would have jurisdiction of suits by a trustee, no act to the contrary existing: for they are nothing more than the

assertion of property rights, of the title to which the Bankruptcy Act is the source (*Cook vs. Waters*, 9 Nat. Bk. Reg. Rep., 155).

The Act provides (Section 70*a*):

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt to all * * * * (4) property transferred by him in fraud of his creditors."

In general, it has been held that if the Federal Courts be not given exclusive jurisdiction of a subject-matter, the State Courts have concurrent jurisdiction thereof, whenever, by their own constitution, they are competent to take it; *jurisdiction in the State Courts exists where it is not excluded by express provision*, or by incompatibility in its exercise, arising from the nature of the particular case (*Claflin vs. Huseman*, 93 U. S, 130, 136, where is a very learned and interesting discussion of the subject in a bankruptcy case).

Even assuming that the complaint demanded, and the judgment awarded, more relief than the Court could give, the latter is only *pro tanto* void (*American Ins. Co. vs. Fisk*, 1 Paige, N. Y., 90).

As was pointed out in the preliminary statement (Subdivision 2), there was no court selected by agreement or contract, to try the issues disposed of herein. No court was named for that purpose, and the strong and inevitable inference is that the parties contemplated a suit, such as was brought in the State Courts, where all trustee's suits were brought at the time the order was entered, July, 1902. Moreover, the trustee is not bound by the alleged contract or agreement, which was not made with him, nor even with the Receiver, but privately, between certain creditors and the chattel mortgagees (*Record*, p. 14), in which the funds were designated *as a Special fund*, to distinguish them, manifestly, from ordinary funds in the bankruptcy courts' possession. The selection of the Receiver to hold the funds was the selection of a mere stakeholder—anybody would have served—and from aught that appears it is chance that the person selected happened to be an officer of the bankruptcy court.

Nor can jurisdiction be conferred by consent upon a court which has none, nor does public policy sanction the selection by agree-

ment of any particular court (ousting all others) for the trial of any particular cause (17 *Am. & Eng. Encyc. Law*, 2d Ed., pp. 1060-1063).

The claim of plaintiffs-in-error to a contract right to try this cause in the bankruptcy court has no support in fact or in law.

The claim of plaintiffs-in-error that the action here could be tried only in the bankruptcy court is not the claim to an *immunity* under or within the meaning of Section 709 of the Revised Statutes, nor to a *title, right*, or privilege thereunder.

It is not believed that the imperfect and partial possession of the funds in this case, which the record shows the bankruptcy court to have, is in any sense sufficient to change the ordinary rule giving the State courts jurisdiction, for in every bankruptcy case, as soon as an adjudication is made, the bankruptcy court is constructively in possession of all the property of the bankrupt, and the mere fact of an adjudication gives the bankruptcy court a power and dominion over the bankrupt's property which has been likened to an attachment (*State Bank vs. Cox*, 16 Am. Bk. Rep. 32; *York Mfg. Co. vs. Cassell*, 15 Am. Bk. Rep., 638; S. C. 201 U. S., 344; *Mueller vs. Nugent*, 184 U. S., 1; *Re Granite City Bank*, 137 Fed. Rep., 818); and notwithstanding this possession of the bankrupt's property, which the bankruptcy court thus has *in every case*, the State courts have universally entertained actions by the Trustee.

Plaintiffs-in-error have taken no steps to oust the state court of jurisdiction. They have joined with defendant-in-error Vollkommer in a thorough litigation of the issues upon the merits, extending the same to the highest State court which could hear the cause. After being defeated, the plaintiffs now seek to rid themselves of the operation of the judgment by a pure technical claim that the court had no jurisdiction, and without any pretense that the judgment would have been otherwise if the cause had been tried in the bankruptcy court. The trustee in seeking the jurisdiction of the State Court followed the approved and universal practice at the time. He would have found it hard to convince the bankruptcy court that it had jurisdiction.

II.

A trustee in bankruptcy may maintain an action to set aside a fraudulent conveyance, whether representing judgment creditors or not.

Whether he can or not, is not a federal question. He may have the capacity to do so, under State laws, which will be followed here.

It does not appear in this record that the trustee did not represent judgment creditors. The inference is that he did.

The point that the trustee did not represent judgment creditors was not taken at the trial, and cannot be made here.

(a)

The capacity of the trustee to sue to set aside conveyances conferred by the provisions of the Bankruptcy Act above referred to is reinforced and extended by the ample statutory provisions of the laws of the State of New York. The first statute on the point was Chapter 314 of the Laws of 1858. Through various amendments, with ever-broadening language, it has passed into its present form as Section 7 of the Personal Property Law (Ch. 417 L. 1897), and, so far as material, reads as follows:

> " An executor, administrator, receiver, assignee or trustee may, for the benefit of creditors or others interested in personal property held in trust, *disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor*, including himself, interested in such estate or property, and a person who fraudulently receives, takes or in any manner interferes with the personal property of a deceased person, or an insolvent corporation, association, partnership or individual, is liable to such executor, administrator, receiver or trustee, for the same or the value thereof, and for all damages caused by such act to the trust estate."

This statute sweeps away at once any force in the point of plaintiffs-in-error that the trustee has no right to maintain the

action, especially when the scope and effect of the statute are seen in the light of the able opinion in *Southard vs. Benner* (72 N. Y., 424), construing the statute. The case cited clearly, and with luminous reasoning, holds that an assignee in bankruptcy (or other similar trustee), by virtue of the act adverted to, may sue to annul a fraudulent transfer and to recover the property, though there may be no judgment creditors; that the trustee, for this purpose, has the capacity and is competent to enforce the rights of simple contract creditors. That was an action to *recover property*, and incidental thereto, a mortgage was declared fraudulent.

The case cited is a companion to numerous cases in the State and Federal Courts holding with clear and certain reasoning the same proposition:

Skilton vs. Codington, New York Court of Appeals, CULLEN, J., 185 N. Y., 80, 87.

Zartman vs. National Bank of Waterloo, First Appellate Division of New York Supreme Court, 109 App. Div., 406, 413.

Mitchell vs. id, United States District Court, Eastern District of North Carolina, 147 Fed. Rep., 280, 285.

Re Pekin Plow Co., Eighth Circuit Court of Appeals, 112 Fed. Rep., 308.

Matter of Metropolitan Store and Saloon Fixture Co., United States District Court, Southern District of New York, 15 Am. Bk. Rep., 119.

Shreck vs. Hanlon, Supreme Court of Nebraska, 104 N. W.. 193.

Sheldon vs. Parker, Supreme Court of Nebraska, 92 N. W., 923.

Crary vs. Kurtz, Supreme Court of Iowa, 105 N. W., 590, 592.

Mueller vs. Bruss, Supreme Court of Wisconsin, 112 Wisc., 406.

Bunnell vs. Bronson, Supreme Court of Errors of Connecticut, 63 Atlantic Reporter, 396, 398.

Basley vs. Coggins, Supreme Court of Florida, 12 Am. Am. Bk. Rep., 355.

Andrews vs. Mather, Supreme Court of Alabama, 9 Am. Bk. Rep., 296.

The cases cited by plaintiffs-in-error do not sustain their claim. *Hewitt vs. Berlin Machine Works* (194 U. S. 296) related solely to the position of the trustee under the New York Statute regu-

lating conditional sales, and held that he had no better title to goods conditionally sold than had the bankrupt. It was not the case of a fraudulent conveyance by the bankrupt, which a creditor might attack, as here. This case is distinguished in *Skilton vs. Codington* (185 N. Y. 80, 88). So, too, of *York Manufacturing Company vs. Cassell* (201 U. S, 344), referred to in *Skilton vs. Codington* (*supra*, at p. 89).

If these cases had been actions to annul fraudulent conveyances, which rest upon a very different basis, and in which the trustee is clothed with a large right of attack, under the Bankruptcy Act, the decisions would have been very different.

New York Economical Printing Company (110 Fed. Rep., 514) was a case of a chattel mortgage void for non-filing, and not a case of fraud. It is in no sense an authority for the position of the plaintiffs-in-error; and as to what it does hold, it was expressly disapproved in the case of *Skilton vs. Codington* (cited *supra*), and it is submitted that this later case is of higher authority, being a decision by the highest State Court upon a question of State law, which the federal courts are bound to respect.

It is notable that in this case of *Skilton vs. Codington* the Court of Appeals reversed the Appellate Division decisions in the same case (reported, 86 N. Y. App. Div., 166, and 105 N. Y. App. Div., 617). The First Appellate Division decision of the case was much relied upon in the courts below by the plaintiffs-in-error and has since been expressly disapproved and overruled as just pointed out.

(b)

That the Trustee's capacity to sue is not a federal question was held in *McKenna vs. Simpson* (129 U. S., 506).

State laws are followed in determining the validity of a chattel mortgage in bankruptcy proceedings; and if the State Court finds fraud the Federal Court, including this Court, will follow and be bound by the adjudication.

Thompson vs. Fairbanks, 196 U. S., 516, 522.
Re Beede, 138 Fed. Rep., 441.
Re First National Bank, 135 Fed. Rep., 62, 65.

And where, under the Bankruptcy Act, the creditors or trustee, could not avoid a conveyance, but under the State law the creditors

could have done so, the trustee, under Section 70*e* of the act, as the successor of the rights of the creditors, can avoid the same (*Empire State Title Company vs. Trustee of Wm. F. Fisher & Co.*, Court of Errors and Appeals of New Jersey, 60 Atlantic Reports, 940).

(c)

As appears from subdivision 8 of the preliminary statement, the *record* nowhere discloses that the trustee *did not* represent judgment creditors. The entire bankruptcy record was in evidence before the trial Court, but is not returned here. The Court below having passed upon *all* the evidence will be presumed here to have found therein sufficient support for its judgment, and if this Court is of opinion that the trustee must have represented judgment creditors, in order to recover, it will presume, from this record that he did. This principle is so trite as not to need the citation of authorities.

(d)

As also appears at subdivision 8 of the preliminary statement, no motion was made at the trial based upon the assumption that the trustee did not represent judgment creditors, nor was the point taken in any way. Not having been raised at the trial, the objection cannot be taken now, and, as to this, there is nothing to review in this Court; nor is it necessary to cite authority in support of this position.

III.

The judgment should be affirmed, or the writ of error dismissed, with costs.

Dated: Bar Association, New York, 12th January, 1907.

Respectfully submitted,

FRANCIS B. MULLIN,

Attorney for Defendant-in-Error Vollkommer.

J. FRANK YAWGER,

FRANCIS B. MULLIN,

Of Counsel.

[31419]

Supreme Court of the United States.

No. 184.—October Term, 1906.

Solon L. Frank and Samuel Frank, doing business under the name of S. L. and S. Frank, Plaintiffs in Error, vs. Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, a bankrupt, and Jacob Vogt.	In error to the Supreme Court of the State of New York.

[April 29, 1907.]

This was a suit commenced in December, 1902, in the Supreme Court of New York for the County of Kings by Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, bankrupt, against Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, and Jacob Vogt, to set aside an alleged chattel mortgage on certain horses, harness, wagons, &c., given by Vogt to defendants Frank, April 16, 1902, as fraudulent, and intended to hinder, delay and defraud creditors.

The mortgagees had taken possession, and creditors immediately thereafter filed petitions in bankruptcy against Vogt in the District Court of the United States for the Eastern District of New York, whereupon and on June 30, 1902, one Stoutenburgh was appointed temporary receiver and duly qualified as such.

As alleged in the complaint, by agreement between the Franks and the petitioning creditors, which was approved by the District Court and entered of record therein July 2, A. D. 1902, it was provided that the property in question should be sold at public auction on July 3 by the temporary receiver; "that the expenses of the sale be paid out of the proceeds thereof; that the said temporary receiver deposit the net proceeds of said sale at the People's Trust Company of Brooklyn as a special fund, there to await the further order of the court upon due notice to all creditors who have or may hereafter appear; that the lien, if any, of the alleged chattel mortgage of the said defendants Frank be transferred to and attached to said special fund, or deposit, in lieu of and to the same extent as if attached to the said property thereinbefore directed to be sold; that in pursuance thereof, said sale was had on the 3d of July, A. D. 1902,

and the net proceeds thereof, amounting to about $5,482.47, were on or about the 10th day of July, 1902, duly deposited in the People's Trust Company of Brooklyn, as provided by said agreement."

July 10, A. D. 1902, Vogt was duly adjudicated an involuntary bankrupt, and on November 12, A. D. 1902, Vollkommer, Jr., was appointed trustee in bankruptcy of Vogt, duly qualified November 21, and entered upon the duties of his office as trustee. He thereafter filed this complaint against the Franks and Vogt, setting up the proceedings and averring that defendants Frank claimed a lien upon the special fund to the whole extent thereof, which constituted a cloud on plaintiff's title to the fund, and he demanded judgment that the chattel mortgage be declared null and void and cancelled and discharged of record, and that the special fund be declared free of the incumbrance of the alleged chattel mortgage, and from any lien or claim by the Franks under the mortgage or otherwise. The trial court held that the mortgage was made "with the intent and purpose of said Vogt and said defendants Frank to hinder, defeat, defraud and delay said Vogt's creditors." And decreed the annulment of the mortgage, and that it was "no lien upon the moneys, viz., $5,481.47, deposited on July 9th, 1902, by Arthur T. Stoutenburgh, temporary receiver, in the People's Trust Company of Brooklyn, New York, under an order of the District Court of the United States for the Eastern District of New York made July 2d, 1902." The case was carried to the Appellate Division of the Supreme Court and the decree was affirmed. Leave to appeal to the Court of Appeals was denied by the Appellate Division, and subsequently by an Associate Judge of the Court of Appeals. This writ of error was then allowed.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Counsel for plaintiffs in error contended below that the State courts had no jurisdiction because the suit was brought to determine title to property or a fund in the possession of the District Court of the United States. The bankruptcy act of July 1, 1898, provided that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." 30 Stat. 544, c. 541, § 23*b*.

In *Bardes* v. *Hawarden Bank*, 178 U. S. 524, we held that the bankruptcy court, except by the consent of the defendant, had no jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted

either in the State courts or in the Circuit Courts of the United States where diversity of citizenship existed. The act of 1898 was amended by the act of February 5, 1903, (32 Stat. 797, c. 487,) section 19 of which provided that the act should "not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight."

The present case was commenced in 1902, and besides the amendment gave the bankruptcy court concurrent and not exclusive jurisdiction.

We give in the margin * quotations from the acts of July 1, 1898, and February 5, 1903, the amendments made by the latter act being italicized.

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* Section 23*b*: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*"

Section 60*b*: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"*If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 67*e*: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall

Undoubtedly the State court, in which the trustee brought this suit, was the court "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them [suits], if proceedings in bankruptcy had not been instituted," and its jurisdiction under the applicable general rule must be conceded.

But plaintiffs in error contend that the possession by the bankruptcy court of the proceeds of the sale of the mortgaged chattels deprives the State court of its conceded jurisdiction to set aside the mortgage as fraudulent.

The contention is wholly inadmissible. The mortgaged property consisted of horses, vehicles, harness, &c., and the order of sale of the temporary receiver, agreed to by plaintiffs in error, was evidently in the interest of all parties, and provided for the deposit of the proceeds, not in the general funds of the estate, but as a special fund, to which the lien, if any, of the chattel mortgage was transferred, and clearly contemplated a plenary suit to determine the validity thereof, which, at that time, there being no diversity of citizenship and no such possession as might lead to a different result, could only be commenced in the State court. The trustee himself commenced it there and obtained the decree, which was in its nature self-executing, and merely set aside the mortgage, and, as incident thereto, declared that the special fund was free from its lien, and, without seeking to interfere with the possession, left it to the bankruptcy court to carry the decree into effect by placing the money in the custody of its officer, the trustee.

No principle of comity was violated and there was no interference with the bankruptcy court. *First National Bank* v. *Title & Trust Company,*

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be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 70*e*: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 19 of act of February 5, 1903: "*That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*"

198 U. S. 280; *Davis* v. *Friedlander*, 104 U. S. 570; *Eyster* v. *Goff*, 91 U. S. 521; *Claflin* v. *Huseman*, 93 U. S. 130; *Re Platteville Foundry & Machine Company*, 147 Fed. Rep. 828; *Guaranty Trust Company* v. *North Chicago Street Railroad Company*, 130 Fed. Rep. 801; *Re Spitzer*, Id. 879; *Bindseil* v. *Smith*, 61 N. J. Eq. 645; *Skilton* v. *Codington*, 185 N. Y. 80. In the latter case the Court of Appeals by Cullen, C. J., in sustaining the jurisdiction of the State court, admirably expounds the applicable principles, with a full citation of authorities. That was a suit against the trustee, while the present case was brought by the trustee.

The possession of the temporary receiver of the special fund was not in the circumstances in any sense sufficient to change the ordinary rule giving the State courts jurisdiction any more than the constructive possession in every case created by adjudication. *Mueller* v. *Nugent*, 184 U. S. 1; *York Mfg. Company* v. *Cassell*, 201 U. S. 344.

It is objected that the trustee had no right to attack the validity of the chattel mortgage because it did not appear that he represented any but simple contract creditors. But the record before us shows that the entire record of the proceedings in the bankruptcy court was in evidence before the trial court, though it was not returned here, so that if it were necessary that the trustee should represent judgment creditors, which we do not decide that it was, it must be presumed that the trial court in passing upon all the evidence found that he did. This may explain why the point was not made in the trial court, and it comes too late here.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court U. S.